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Supreme Court, U.S.
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OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

WAYNE LEE PALMER
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD M. UPTON
Counsel of record
Law Firm of Richard M. Upton
436 Government Street
Baton Rouge, LA 70802
(225) 344-1704

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MIDDLE DIST. OF LA

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

INDICTMENT FOR MAKING A FALSE STATEMENT TO A FIREARMS DEALER, AND POSSESSION OF A FIREARM BY A PERSON ADJUDICATED AS A MENTAL DEFECTIVE AND HAVING BEEN COMMITTED TO A MENTAL INSTITUTION

UNITED STATES OF AMERICA

versus

WAYNE LEE PAMER

CRIMINAL NO.; 05-121-D-M3

18 U.S.C. §922(a)(6)
18 U.S.C. §922(g)(4)

THE GRAND JURY CHARGES:

COUNT ONE

On or about December 16, 2004, in the Middle District of Louisiana, WAYNE LEE

PALMER, defendant herein, in connection with the acquisition of a firearm, that is, a Hi-Point, model C9, 9mm pistol, bearing serial number P1218714 from Pelican Pawn Shop, 2646 Florida Boulevard, Baton Rouge, Louisiana, a licensed dealer of firearms, did knowingly make a false and fictitious statement to said dealer, which statement was intended and likely to deceive the dealer with respect to a fact material to the lawfulness of the said acquisition of the firearm under the provisions of Chapter 44 of Title 18, United States Code, in that WAYNE LEE PALMER, represented that he had not been adjudicated mentally defective, whereas, in truth and in fact, WAYNE LEE PALMER then and there well knew that on March 11, 2004, in Criminal No. 03-192-C-M1, the Honorable United States District Court Judge Adrian G. Duplantier, found that WAYNE LEE PALMER was suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings and unable to properly assist in his defense, and committed WAYNE LEE PALMER to the custody of the Attorney Generall, namely the Federal Medical Center in Butner, North Carolina.

The above is a violation of Title 18, United States Code, Section 922(a)(6).

COUNT TWO

On or about May 12, 2005, in the Middle District of Louisiana, WAYNE LEE PALMER,

defendant herein, having been adjudicated as a mental defective and having been committed to a mental institution, knowingly did possess the following firearm and ammunition:

a. Hi-Point, model C9, 9mm pistol, bearing serial number P1218714;
b. Seven (7) rounds of CCI 9mm ammunition; and
c. Forty-eight (48) rounds of Remington 9mm ammunition

which firearm and ammunition had previously been shipped and transported in interstate commerce.

The above is a violation of Title 18, United States Code, Section 922(g)(4).

UNITED STATES OF AMERICA, by

_____

DAVID R. DUGAS
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF LOUISIANA

A TRUE BILL
REDACTED PER PRIVACY ACT
GRAND JURY FOREPERSON

_____

FREDERICK A. MENNER, JR.
ASSISTANT UNITED STATES ATTORNEY

_____

DATE

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MIDDLE DIST. OF LA
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UNITED STATES DISTRICT COUR
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO.: 05-0121
SECTION: "LMA" (LM)

REPORT AND RECOMMENDATIONS

The above captioned matted [sic] was referred to the undersigned Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary and submission of proposed findings and recommendations for disposition on the following motions:

1 – Defendant's Motion for Examination to Determine Mental Competency and

Notice of Intent to Use the Defense of Insanity (Doc. #31)'[1]

2 – Defendant's Motion for a Competency Hearing (Doc. #41);[2]

3 – United States of America's Motion for an Order for Involuntary Medication to Restore Competency (Doc. #48);[3]

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[1] See Doc. #39, Minute Entry dated August 18, 2005, wherein the Magistrate Judge held a hearing and ruled as follows:

Based on the testimony of Dr. John W. Thompson, Jr., and his psychiatric report, the Court finds by a preponderance of the evidence that the defendant, Wayne Lee Palmer, is presently suffering from a mental disease or defect rendering him mentally incompetent, i.e. to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Thereafter, Palmer was ordered committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d). The Court also ordered the Attorney General to hospitalize the defendant for treatment in a suitable psychiatric facility for a reasonable period of time, not to exceed four (4) months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed

[2] The United States had previously advised that medical personnel of the Federal Medical Center, Butner, North Carolina, agreed that the defendant was presently incompetent to stand trial and recommended involuntary medcation for purposes of restoring defendant's competence. See Doc. #44, United States' Response to Defendant's Motion for Competency Hearing.

[3] See Doc. #47, Minute Entry dated January 13, 2006, wherein the Magistrate Judge ordered a hearing be held on February 2, 2006, under the authorities of **Sell v. United States**, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) and **United States v. White**, 431 F.3d 431 (5th Cir. 2005) (Nov. 21, 2005). The issues to be addressed were defined as:

The Magistrate Judge ruled on the first motion. Accordingly, for the reasons and discussions that follow, the competency hearing is granted. It is recommended that the motion for an order for involuntary medication to restore competency be granted.

Background

On May 12, 2005, the defendant Wayne Lee Palmer was arrested near the Paul M. Hebert Law Center, Baton Rouge, Louisiana, by Deputy United States Marshals who were assigned there to provide security for federal judges expected to attend a Federal Bar Association Seminar. One of the Deputy Marshals recognized the defendant as an individual who had been previously arrested. The deputies noticed a black pistol on the front passenger seat of the vehicle and demanded that the defendant get out of the vehicle. The defendant began driving away but was apprehended and the firearm was seized. During the search of the vehicle, the deputies seized a box of ammunition, a loaded pistol magazine, $7,217.00 in U.S. currency and two Louisiana driver's licenses in the defendant's

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Whether or not the United States should be orered to show cause why the defendant should be continued in the custody of the Attorney General of the United States for an additional period of time as provided in Title 18, United States Code, Section 4241(d)(2)(A)? Whether or not the Court should order the Federal Medical Center authorities to administer antipsychotic medication to the defendant on an involuntary basis in order to render the defendant competent to stand trial?

name. Defendant was charged in a criminal complaint and later indicted by a federal grand jury on one count of possession of a firearm by a person adjudicated mentally defective, in violation of Title 18, United State Code, Section 922(g)(4).[4]

Facts

The following is a summary of the testimony and evidence introduced during the competency hearing held on February 2, 2006.[5]

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[4] See Exhibit 10, Criminal Complaint. Petitioner had previously been arrested on April 14, 2003, and charged via complaint and subsequent grand jury indictment with one count of threatening to murder a federal official, in violation of Title 18, United States Code, Section 115(a)(1)(B). The facts leading to defendant's arrest started at the United States District Court (Courthouse) Middle District of Louisiana. Defendant's civil law suit had been dismissed and he was dissatisfied and proceeded to the Clerk's office to get an explanation. He became disorderly and threatened to kill a federal protective officer.

The court determined that defendant was incompetent to stand trial and ordered a mental health evaluation to be held at the Federal Medical Center in Butner, North Carolina. The medical staff at Butner issued its report and evaluation on August 11, 2004, finding that the defendant was suffering from delusional disorder, persecutory type. (See Exhibit 1, p.6) The clinicians opined that defendant's disorder was treatable with antipsychotic medication and they recommended involuntary medication. (See Exhibit 1, pp. 7-10) The District Court did not order involuntary medication. The defendant was referred for an evaluation to determine whether he was eligible for civil commitment pursuant to Title 18, United States Code, Section 4246. (See Exhibit 2.) After receipt of the clinician's civil commitment report, the indictment was dismissed and the defendant was released.

[5] See Record Doc. No. 53, Transcript of Competency Hearing, hereinafter referred to as T ____. (page no.)

Angela Walden Weaver, Ph.D., a psychologist employed at the Federal Medical Center Butner, North Carolina, for eleven years, testified as an expert in the field of forensic psychology. (T. 11, 12, 14) Dr. Weaver evaluated the defendant Wayne Lee Palmer, on three separate questions. The first evaluation report is dated August 2004. (Exhibit 1)(T. 17.) Dr. Weaver's diagnosis of defendant was delusional disorder persecutory type with a rule-out diagnosis of schizophrenia undifferentiated type. (T. 18.) Dr. Weaver's opinion was that, defendant was not competent. (T. 20, 29.) Some of Dr. Weaver's recommendations were to refer defendant to a competency restoration group, participation in psychological testing and that defendant consent to treatment with anti-psychotic medication. (T. 21.)

Dr. Weaver also was asked to perform an evaluation of whether the release of defendant from an institutional setting would create a substantial risk of bodily injury to other persons. See Exhibit No. 2 Report dated October 2004 (T. 21-22) and Report dated December 2005 Exhibit No. 4 (T. 30). The medical section of the reports were done by Dr. Lucking. In the October 2004 Report, Dr. Weaver opined that defendant was not a danger to the community. (T. 22.) However, in the December 2005 Report, Dr. Weaver opined that the defendant was not dangerous within the Federal Medical Center at Butner (T. 30-31.) Dr. Weaver expressed no opinion as to whether or not defendant presently poses a substantial risk of bodily injury to anyone

outside the institutional setting. (T. 31-32.) Since the defendant would not consent to be treated with medication, an administrative hearing (involuntary medication hearing) was held. The hearing was conducted by Jean P. Zula M.D., Chief Psychiatrist, FMC Butner, on December 21, 2005. Dr. Zula agreed with Dr. Weaver's and Dr. Lucking's diagnosis that Palmer suffers from a thought disordered mental illness, consistent with schizophrenia. Morevoer, Dr. Zula concluded that Palme does not meet criteria for admission of involuntary medication pursuant to the **Washington v. Harper** standard. (See Exhibit No. 4, pages 1-10; also see T. 31-33.)[6] Palmer did not wish to appeal the decision.

Robert George Lucking, M.D., a Board Certified Psychiatrist employed at the Federal Medical Center Butner, North Carolina, testified as an expert in general psychiatry and forensic psychiatry. (T. 42-45.) Dr. Lucking and Dr. Weaver worked on the evaluation of defendant Wayne Lee Palmer. Dr. Weaver performed the forensic evaluation and Dr. Lucking prepared the medical portion of the recent report. (T. 45-46, Exhibit 3.) His role was to look at the evaluation of the

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[6] See United States' Post-Hearing Brief, Doc. No. 56, page 7, where it was properly pointed out that "(P)ursuant to the Fifth Circuit's decision in **United States v. White**, 431 F.3d 431 (5th Cir. 2005), the clinicians found that the defendant did not present a danger to himself or others in a clinical setting and thus medication was not warranted as an alternative, i.e., non-competence grounds as set forth in **Washington v. Harper**, 494 U.S. 210 (1990). (Exhbit 3, p. 15)", Also see 28 C.F.R., Section 549 43.

defendant and to recommend a treatment plan, especially any treatment plan that may include medication. (T. 46.) Dr. Lucking was familiar with Dr. Weaver's previous diagnosis of the defendant as delusional disorder persecutory type and the recent diagnosis by Dr. Weaver of the defendant with schizophrenia undifferentiated type. (T. 46-47.)

Based upon the recent diagnosis involving schizophrenia, Dr. Lucking and the medical team at Butner recommended treatment with antipsychotic medication. (T. 47.) It was Dr. Lucking's opinion "that treatment with antipsychotic medication would restore him to competency, is substantially likely to restore him to competency." (T. 48.) When asked for defendant's prognosis for improvement without treatment with antipsychotic medication, Dr. Lucking said:

> A Its very, very dim. People with a diagnosis of schizophrenia generally don't get better. Schizophrenia is a chronic, progressive illness. They continue to have symptoms. They have a decline in their level of functioning. They generally have chronic symptoms and they just don't get better.

Q Now in your medical opinion, are there any other less intrusive means available in a treatment of defendant that could achieve the same result? And I mean by "achieve the same result," render him competent and competent to stand trial, such as the administration of anti-psychotic medication?

A No. I don't think that – as I outlined in the report, other work to restore his competency. They're generally adjunctive treatments used in addition to medication to improve compliance, to improve understanding, and to improve level of functioning, social functioning.

Q Now I want to –

A Those –

Q I'm sorry.

A I was going to say that those treatments, those treatments will not attack and will not control the core symptoms of schizophrenia.

(See T. 49-50.)

Dr. Lucking said that there were three antipsychotic medications available for involuntary administration. First generation medications are haldol decanoate (generic name haloperidol decanoate) and fluphenazine decanote (trade name prolixin, T. 57). The second generation medication is risperidone consta (T. 50.) the difference between the first and second generaton antipsychotic medications is in the side effects. (T. 51.) The side effects from administration of first generation antipsychotic medications and the treatment of those side effects. (T. 51-57 and 64-70.) Dr. Lucking stated that he did not think the side effect, even if the defendant was non-responsive to the treatments for the side effects, would be a substantial impediment to his competency. (T. 73.)

The side effects of the administration of the second generation antipsychotic medication risperidone consta were discussed as being metabolic as opposed to the neurologic side effects of the first generation antipsychotic medications. (T. 57-58.) Dr. Lucking opined that treatment of the side effects of the second generation antipsychotics will not prevent a defendant from assisting in his own defense at trial. (T. 59.)

Dr. Lucking's treatment plan for the defendant would be the use of haldol decanoate in the range of around 150 milligrams to 200 milligrams given every four weeks for approximately four months. (T. 59, 61.) The reasons given by Dr. Lucking for the u se of haldol decanoate are: its easier to

monitor the individual; side effects can be treated more easily than those of risperidone, it can be very difficult to manage; haldol decanoate is highly effective; and, he had a lot of experience with it. (T. 59-60.) Dr. Lucking testified that it was medically appropriate to treat the defendant with an antipsychotic. (T. 61.) Dr. Lucking and Dr. Weaver have recommended involuntary medication of the defendant as he has refused their attempts to consent to voluntary medication. (T. 62-63.)

John W. Thompson, Jr., M.D., Chief of Staff of the Eastern Louisiana Mental Health System and Vice Chair of Adult Psychiatry and Director of Forensic Neuropsychiatry at Tulane University testified as an expert in the field of Neuropsychiatry. Dr. Thompson is Board certified in adult psychiatry, forensic psychiatry and addiction psychiatry. (T. 80-82.) Dr. Thompson evaluated the defendant and issued his report (Exhibit 5) on July 8, 2005, finding the defendant incompetent to stand trial. The diagnosis was not substantially different from that of Drs. Weaver and Lucking's diagnosis of the defendant. (T. 83-84.) Dr. Thompson recommended that the defendant be referred back to Butner and that he be force medicated by physicians. (T. 84.) Dr. Thompson testified that his recommendation is presently the same. Dr. Thompson disagrees with Dr. Lucking's recommendation of the administration of haldol to render the defendant competent to stand trial. It was Dr. Thompson's opinion that the administration of a second generation antipsychotic medication

would minimize the risk of tardive dyskinesia and the neurologic side effects that occur with first generation medication. (T. 86-87.) Dr. Thompson said he thinks that 90% of state medical centers in the country use second generation treatment medication rather than the first generation medication. (T. 88.) Moreover, Dr. Thompson opined: that medication, even forced medication is appropriate for the defendant (T. 93); that the administration of antipsychotic medication is medically appropriate to render the defendant competent to stand trial (T. 95-96); and, that the side effects of the medications, for the most part, can be treated and the defendant can go to trial as the side effects will not affect his trial court demeanor, in the vast majority of cases. (T. 96.)

Special Agent Thomas M. McNulty, an employee of the Federal Bureau of Investigation, testified that he investigated allegations on October 16, 2003, that the defendant had threatened Judge Polazoa [sic] and William Thomas, a security officer. (T. 107.)[7] After obtaining an arrest warrant, Agent McNulty and other law enforcement officers went to arrest the defendant from his residence. The defendant was observed standing on his porch and when he saw the

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[7] During cross-examination, Agent McNulty agreed that the name Judge Polozola, in relation to a threat came from an interpretation of a comment by Mr. Lawrence Talamo, not from the words directly from the mouth of Mr. Palmer. (T. 119.) Moreover, the formal charge was not based on a threat made against Judge Polozola but a threat against court security officer William Thomas. (T. 120.)

officers, defendant went into his house and came out with something in his hand that the agent thought to have been a gun or a cell phone. (T. 111-112.) Thereafter, Agent Gaines said "He's got a gun. He's got a gun." Agent McNulty ordered defendant to raise his hands but defendant refused and kept his hands near his waist where Agent McNulty thought defendant had placed a gun. The defendant resisted the arrest and began to fight. He was subdued and a semi-automatic handgun was found in his back pocket. (T. 113-115.) After placing defendant into the back of the agent's vehicle, defendant became very irate and appeared to be completely out of touch with reality. (T. 115.)

Applicable Law

The applicable law section of this report is taken in part, from **United States v. Algere**, 396 F. Supp. 2d 734, 738-739 (E.D. La. July 5, 200) (Vance, D.J.) after study and research.

An individual has a constitutionally protected liberty interest in rejecting medical treatment. *See* **Washington v. Harper**, 494 U.S. 210, 211, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (recognizing "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs"); **Riggins v. Nevada**, 504 U.S. 127, 134, 112 S.Ct. 1810, 1.8 L.Ed.2d 479 (1992) (repeating that there is a constitutionally protected "interest in avoiding involuntary

administration of antipsychotic drugs"). Such medication may be forcibly administered, however, in certain circumstances. In **Harper**, for example, the Supreme Court held that administering antipsychotic drugs against a prison inmate's will does not violate Due Process Clause "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." **Harper**, 494 U.S. at 227, 110 S.Ct. 1039-40. Here, however, the administrative hearing resulted in a determination that forcibly medicating Palmer is not warranted or dangerousness grounds under **Harper** because Palmer is not dangerous to himself or others in his current prison environment. The government does not challenge that determination. Accordingly, it is undisputed that this request involves the involuntary administration of medication to a non-dangerous defendant solely for the purposes of restoring him to competency for trial, which places it squarely within the standard set forth by the Supreme Court in **Sell v. United States**, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In **Sell**, the Court concluded that the government may involuntarily administer antipsychotic drugs "to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial" if certain conditions are met. **Id.** at 179, 123 S.Ct. 2174. Such treatment is authorized only if it "is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is

necessary significantly to further important governmental trial-related interests." **Id.** The Court indicated that this standard requires consideration of four factors: (1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate. **Id.** at 180-81, 123 S.Ct. 2174. Although the Court did not address the standard by which the Government must establish these factors, at least one other circuit has concluded that the government must present clear and convincing evidence. **United States v. Gomes**, 387 F.3d 157, 160 (2nd Cir.2004), cert. denied, 543 U.S. 1128, 125 S.Ct. 1094, 160 L.Ed.2d 1081 (2005).

Analysis

1. Important Government Interests

The first criterion of the **Sell** analysis requires the Court to "find that important governmental interests are at stake." **Sell**, 539 U.S. at 180, 123 S.Ct. at 2184. "[T]he government's interest in bringing an individual accused of a serious crime is important. **Id.** The Court in **Sell** gave examples of special circumstances which "may lessen the importance of that interest" such as, the defendant's refusal to take drugs voluntarily may result in lengthy civil confinement in an institution for mentally ill

and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. **Id.** The potential for future confinement affects, but does not totally undermine the strength of the need for prosecution. The Court instructed, "the same is true of the possibility that the defendant has already been confined for a significant period of time." **Id.** The government has an interest in assuring that the defendant's trial is a fair one. **Id.**

In the case of **United States v. Algere**, 396 F.Supp.2d at 739, Judge Vance noted that in determining whether a crime is "serious" for purposes of **Sell**, courts have looked to the jurisprudence addressing the Sixth Amendment right to a jury trial. Judge Vance determined that existing precedent indicated that a "serious" offense is one for which a defendant may be sentenced for more than six months. **Id.** Judge Vance further noted that most of the courts which have considered whether an offense is "serious" in the context of a involuntary medication proceeding have focused on the maximum penalty that can be imposed for the offense, rather than the probable sentencing guideline range. **Id.** See also **United States v. Evans**, 404 F.3d 227 (4th Cir. 2005) (finding that charge of threatening to murder federal judge, a felony whose maximum term of imprisonment is 10 years, constitutes a "serious crime").

The defendant Wayne Lee Palmer stands accused of a serious crime, one which

would justify the governmental interest in this case. The underlying charge – possession of a firearm by one adjudicated as mental defective under Title 18, United States Code, Section 922(g)(4) – carries a maximum sentence of ten years. Other courts have found that the illegal possession of a firearm is a serious crime for which involuntary medication would be warranted. See, e.g., **Algere, supra** (felon in possession of a firearm); **United States v. Martin**, 2008 WL 1895110 (W.D. Va. Aug. 10, 2005) (charges under District of Columbia laws including possession of an unregistered firearm, carrying a handgun without a license and unlawful possession of ammunition); **United States v. Gomes**, 187 F.3d 157 (2d Cir. 2004) (possession of a firearm by a convicted felon; defendant qualified as an armed career criminal under Title 18, United States Code, Section 924(e)). But see **United States v. Dumeny**, 295 F.Supp. 2d 131, 132-133 (D. Me., 2004) (where it was held that possession of a firearm by one committed to a mental institution (a violation of Title 18, United States Code, Section 922(g)(4)) was not a serious enough crime to merit involuntary medication of a defendant for trial competence purposes.) This Court concludes that Palmer is charged with a serious offense.

The risk of violence in the subject case is demonstrated by the facts and circumstances surrounding Palmer's arrest. The charge in this case carries a maximum sentence of ten years incarceration. The defense argues that the government interest is lessened because the Sentencing Guidelines

call for a sentence ranging from 15 to 21 months. At the time of briefing (May 23, 2006), the defendant had been confined approximately 14 months and at the time of this report, 16 months. Moreover, if involuntary medication is ordered, the defense argues that the defendant could be confined for at least 4 months for medication and there is a possibility of an additional 4 months if the medication is changed. (See Dr. Lucking's testimony, t. 60-61 & 79.) The defense argues in effect that the defendant could be confined a total of 24 months pretrial, which would equal or exceed a sentence under the Sentencing Guidelines. Thus, the defense argues that Palmer could serve more than his maximum sentence prior to commencement of trial after institution of medicine.

The government argues that the Sentencing Guideline range, especially post-**United States v. Booker**, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (the Supreme Court held that the Federal Sentencing Guidelines are advisory, not mandatory) gives only an idea of what the sentence may be. Given the defendant's history of threatening and dangerous behavior, a district court could impose a lengthy sentence and could also impose a term of supervised release if the defendant is prosecuted and convicted as charged. Therefore, the importance of the need of prosecution of the defendant Palmer justifies the involuntary medication of Palmer to restore his competence. Review of the testimony and exhibits shows that the

defendant's prior behavior (threat to kill a federal court security officer and his second arrest near a conference attended by federal judges while the defendant was armed,) strongly suggests that he poses a threat to federal employees of the court (MDLA). The government's interst in bringing the defendant to trial is not diminished.

The possibility of a civil commitment does not diminish the government's interest in bringing the defendant to trial. [See Dr. Lucking's report of October 15, 2004, (Exhibit 2) where the staff at Butner did not find the defendant to be a candidate for civil commitment.] There was nothing presented at the evidentiary hearing which indicated that a civil commitment would be appropriate. The government's interest in obtaining a criminal conviction is not diminished.

2. Whether Involuntary Medication Will Significantly Further the Government's Interests?

The second criterion of the **Sell** analysis requires the court to conclude that "involuntary medication will significantly further" the government's interests. 539 U.S. at 181, 123 S.Ct. 2184. In arriving at the above conclusion, the Court must find that the administration of the medication is both "substantially likely to render the defendant competent to stand trial," and is "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to

assist counsel in conducting a trial defense." **Id.**

The Facts section of this Report, pages 6 through 10, which is a summary of the medical testimony of Dr. Robert George Lucking and Dr. John W. Thompson, Jr., is hereby incorporated in this section as though fully printed herein. The following is a more detailed review of the doctors' testimony.

Drs. Lucking and Thompson testified that the administration of antipsychotic medication would render the defendant competent to stand trial. (T. 47-48, 96.) Drs. Lucking and Thompson agreed that the antipsychotic medication was substantially unlikely to have side effects which would affect the trial demeanor. (T. 56, 96.)

Drs. Lucking and Thompson opinions differed on which antipsychotic medication was best indicated for the defendant based on the type of side effects typically experienced by a schizophrenic patient. Their difference of opinion regarding a proposed treatment regime does not affect the ultimate conclusion that the defendant should be administered antipsychotic medication.

In his 2005 evaluation, Dr. Lucking set forth the two types of antipsychotic medication available for a schizophrenic patient. The first generation antipsychotic medications, which include haldol decanoate (haldol), have side effects which include parkinsonism (stiffness and difficulty walking), akathisia (restlessness), and dystonic symptoms. (T. 51-56.) These side effects occur to varying degrees

in approximately 30% of the patients treated. (Exhibit 3, p. 9.) These symptoms can generally be successfully treated with other medications. (T. 51-53; 74-76.) The medications used to treat the side effects do not generally have side effects which will impair a patient's competency to stand trial. (T. 74.) One group of side effects of the first generation antipsychotic medications include tardive syndromes, which are usually the result of long-term use. (T. 53-56.) Tardive akathisia is usually successfully treated. (Exhibit 3, p. 10.)[8] There is not much treatment for tardive dyskinesia, which can result in permanent conditions, and thus the patient must be monitored for any sign of these symptoms. (T. 70-71, 76.) If a patient appears to be developing any of these symptoms, then his medication regime can be changed to a second generation antipsychotic medication, which does not include these side effects. (T. 76.) The rarest and most serious potential side effects of the first generation antipsychotic medication are sudden death and neuroleptic malignant syndrome. (T. 55.) Dr. Lucking testified that these two side effects occur very rarely and that he himself had never seen such a case. (T. 55.)

Of the first generation antipsychotic medications, haldol and fluphenazine (prolixin) are available in injectable form that could be used to treat the defendant.

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[8] There is a five percent annual incidence of tardive diskinesia (5% after one year; 10% after two years, and 15% after three years). (T. 55-56.)

The second generation antipsychotic medications generally have different side effects, mainly metabolic ones. (T. 57.) These side effects include weight gain or obesity, insulin resistance, high blood pressure, and serum lipid abnormalities. (T. 58; Exhibit 3, p. 13.) These side effects can usually be monitored and treated. There are some tardive syndromes associated with the second generation medications, but the incidence is much lower than with the first generation medications. (Exhibit 3, p. 12.) These side effects can be monitored and treated. (T. 59.) Because the metabolic side effects require blood testing for monitoring, a defendant who refused treatment would be subject to both the involuntary injection of the medication and the periodic drawing of blood to monitor his condition. (T. 62.)

Dr. Lucking would most likely opt for haldol, based on its efficacy in treating the symptoms of schizophrenia; the ease of treatment of its side effects; and the non-intrusive nature of the monitoring of symptoms. (i.e., no need for involuntary periodic blood withdrawal). (T. 59-60.) Dr. Thompson said that the monitoring of the metabolic side effects of risperidone consta can easily be done in an institutional or penal setting. (T. 88-89.) Moreover, Dr. Thompson said that both the first and second generation antipsychotic medications were substantially unlikely to render the defendant competent to stand trial and substantially unlikely to have side effects that would render him incompetent. (T. 96.) Further, Dr. Thompson

stated that, up until two years ago, when risperidone was finally made available in an injectable form, the only treatments available for the involuntary treatment of schizophrenic patients were the first generation antipsychotic medications. (T. 98-99.) Dr. Thompson still considers the first generation medications valid treatments when the circumstances so require or when the second generation medication is not effective in treating the patient. (T. 100, 105.)

In conclusion, both Drs. Lucking and Thompson agreed that both the first generation and the second generation antipsychotic medications are appropriate treatments for the defendant. They also agreed that the side effects generated by both generations of medications are maneageable and, unlikely to affect the outcome of a trial. Thus, this prong of the **Sell** analysis is met. Therefore, the court concludes that the involuntary administration of antipsychotic medication to the defendant will further the government's interests.

3. Whether Involuntary Medication is Necessary to Further the Government's Interests?

The third criterion of the **Sell** analysis requires the court to conclude that involuntary medication is necessary to further the government's interests by finding "that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." **Sell**, 539 U.S. at 181, 123 S.Ct. 2185.

Based upon the recent diagnosis of the defendant as schizophrenia undifferentiated type, Dr. Lucking and the medical team at Butner recommended treatment of the defendant with antipsychotic medication. (T. 47.) Dr. Lucking testified that the only treatment option available for a schizophrenic patient such as the defendant to render him competent to stand trial is antipsychotic medication. (T. 48-50; also see Exhibit 3, p. 7.) the defendant will not voluntarily receive the medication as evident by the testimony of Dr. Weaver and Dr. Lucking. (T. 34-35; 63.) Dr. Lucking expressed his opinion as follows in pertinent part:

> Q Have you, in fact, have you or someone as part of your treatment team, sought permission or sought to persuade or talked to the defendant about possible voluntary medication?
>
> A We have. Both Dr. Walden Weaver and I have talked to Mr. Palmer and recommended that he take the medication and advised him that it would be the best course for him to take the voluntary medication, or we would have to seek an Order for involuntary medication. We have done that on several occasions.

Q And he has refused each time?

A He has refused each time.

(T. 63.)

When Dr. Lucking was asked as to whether there were any other less intrusive treatments available for the defendant which would render him competent to stand trial, Dr. Lucking stated, "As I outlined in the report, other psychotherapy, education, cognizance therapy will not work to restore [the defendant's] competency"...and that" without medication, the defendant's prognosis is "very, very dim." (T. 49.) [sic]

The medical team at Butner opined that involuntary medication is necessary to restore Mr. Palmer's competency to stand trial. (Exhibit 3, p. 7.) The medical team addressed the less intrusive treatments regarding the defendant as follows:

> Alternative, less intrusive treatments which are available are unlikely to be effective in achieving the same results. First, Mr. Palmer does not have any insight/understanding that he has a mental illness. He, therefore, does not believe he is in need of treatment of any type. He is unlikely to engage in any form of psychotherapy (cognitive-behavioral, group, behavioral, interpersonal). Furthermore, while there is evidence in the psychiatric literature that some

> forms of psychotherapy are beneficial to an individual with psychotic symptoms, this is as an adjunctive treatment to the antipsychotic agents to improve such things as insight, compliance, or coping skills. There is no evidence that psychotherapeutic techniques alone are effective alternatives for antipsychotic agents.

(Exhibit 3, p.7.)

Considering the medical testimony and report, this Court finds that involuntary medication of the defendant is necessary to further the government's interests because the evidence established that less alternative treatments are unlikely to achieve substantially the same results.

4. Whether the Administration of Antipsychotic Medication is Medically Appropriate?

The fourth criterion of the **Sell** analysis requires the court to "conclude that the administration of the drugs is medically appropriate, i.e., in the patient's best medical interests in light of his medical condition." 539 U.S. at 181, 123 S.Ct. 2185.

The defense concedes that the administration of antipsychotic medication is an appropriate treatment from a medical standpoint. (See Record Doc. No. 57, page 4, Memorandum on Behalf of Defendant Wayne Lee Palmer.)

As previously mentioned, Dr. Lucking and Dr. Thompson said that the treatment of the defendant with antipsychotic medication is medically appropriate to render the defendant competent to stand trial. (See pages 8-9- of this Report.) The defendant's prognosis for improvement without treatment with antipsychotic medication is very very dim. [sic] People with schizophrenia have chronic symptoms and they just don't get better. (T. 48-49.) If the defendant is treated he will most likely have a decrease in delusional beliefs and auditory hallucinations, a decrease in cognitive disorganization and restoration of more normal thought process thereby improving the level of communication between the client and his attorney. (Exhibit 3, p.6.) The court concludes that involuntary administration of antipsychotic medication to the defendant is medically appropriate and is in the defendant's best medical interest in light of his medical condition.

Recommendation

After considering the record, the applicable law and Wayne Lee Palmer's current lack of competence to stand trial, it is hereby recommended that the district court order Palmer committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d)(2)(A) and Grant the Government's motion to have Palmer medicated involuntarily to render him

competent to stand trial. The Attorney General shall hospitalize Palmer for medical treatment including involuntary administration of antipsychotic medication at a suitable facility for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability in the foreseeable future that Palmer will attain the capacity (competency) to permit the trial to proceed. The Attorney General shall prepare a report and submit same to the court pursuant to Title 18, United State Code, Section 4247(b) and (c).

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. **Douglass v. United Service Auto Ass'n**, 79 F. 3d 1415, 1430 (5th Cir. 1996).

Baton Rouge, Louisianaa, this 28th day of July, 2006.

s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO. 05-121
SECTION "LMA" (LM)

DISTRICT JUDGE LANCE AFRICK
MAGISTRATE JUDGE LOUIS MOORE, JR.

__Fee_____
__Process_____
X Dktd_____
__CtRmDep_____
__Doc. No_____

ORDER AND REASONS

The Court, having considered the Government's motion for an Order for involuntary medication to restore Wayne Lee Palmer's competency to stand trial, the memoranda of the defendant and the government, the applicable law and the Report and Recommendation of the U.S. Magistrate Judge, the filed objections t the Report and Recommendation and the Government's response, hereby approves the Report and

Recommendation of the U.S. Magistrate Judge and adopts it as its opinion in this matter.

In arriving at its conclusion, the Court has adopted the standards of proof, i.e. proof by clear and convincing evidence, set forth in *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004). *See also United States v. Evans*, No. 06-4480, 2006 U.S. App. LEXIS 23263, at *2 (4th Cir. Sept. 12, 2006); *United States v. Bradley*, 417 F.3d 1107, 1114 (10th Cir. 2005); *United States v. Algere*, 396 F. Supp. 2d 734, 746 (E.D. La. 2005) (Vance, J.) (applying same standard).

Accordingly,

IT IS ORDERED that the United States' motion for an Order for involuntary medication to restore competency of Wayne Lee Palmer is **GRANTED**.

IT IS FURTHER ORDERED that Wayne Lee Palmer is committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d)(2)(A). The Attorney General shall hospitalize Palmer for medical treatment including involuntary administration of antipsychotic medication at a suitable facility for a reasonable period of time, not to exceed four months, as is necessary to restore Palmer to competency to permit the trial to proceed. Medical personnel **must** provide Palmer with a copy of this Order and Reasons, and explain to him the potential side effects of the medication. All medical personnel treating Palmer shall request that Palmer voluntarily take the medication before each and every

involuntary administration of medication. If Palmer does not agree to take the medication voluntarily within ten days of the date of this Order, medical personnel are authorized to administer the medication over Palmer's objection.

IT IS FURTHER ORDERED that if, upon reaching the close of the four month period, Palmer has not been restored to competency, but there is a substantial probability that he can be restored to competency if treatment is continued, the Government may file a motion for this Court to extend Palmer's commitment and treatment.

IT IS FURTHER ORDERED that, at the end of four months, or when Palmer's competency is restored if that occurs in less than four months, a report shall be filed by the Attorney General with the Court detailing the results of the treatment. The report must set forth the criteria that are used to determine whether Palmer has been restored to competence to stand trial and the result of the application of those criteria to Palmer's case. If the doctors conclude that Palmer has been restored to competence to stand trial, they must also set forth what side effects, if any, Palmer experienced on the medication and how the medication will, if at all, affect Palmer at trial.

IT IS FURTHER ORDERED that a conference shall be held by the U.S. Magistrate Judge on or before January 19,

2007, so that defendant's status can be reviewed.

New Orleans, Louisiana, September 20, 2006.

s/ Lance M. Africk

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

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BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO. 05-121-D

NOTICE OF APPEAL

NOW COMES THE DEFENDANT, Wayne Lee Palmer, who gives notice of his appeal to the United States Fifth Circuit Court of Appeals from the District Court's ruling rendered on September 20, 2006 granting the United States' motion for an order for involuntary medication to restore the defendant to competency to stand trial.

BY ATTORNEY:
S/ RICHARD M. UPTON
RICHARD M. UPTON

ATTORNEY AT LAW
436 Government Street
Baton Rouge, Louisiana 70802
Telephone: (504) 344-1704
Bar Roll No.: 12984

Additional Notices Sent to:
USCA
TRF mailed to R. Upton

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon counsel for all parties to this proceeding by mailing the same to each by First Class United States mail, properly addressed and postage prepaid on this 22 day of September, 2006.

s/ Richard M. Upton
RICHARD M. UPTON

Additional Notices Sent to:
USCA
TRF mailed to R. Upton

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2007
Charles R. Fulbruge III
Clerk

No. 06-31018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WAYNE LEE PALMER,
Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana

Before GARWOOD, JOLLY and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This interlocutory appeal involves the district court's grant of the Government's motion to involuntarily medicate Wayne Lee Palmer to render him competent to stand trial. Because we conclude that this motion is constitutionally permissible under the

particular circumstances shown in this record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Palmer has had a long history of involvement with federal authorities. In October 2003, he entered the Clerk of Court's office for the Middle District of Louisiana, demanding to know why the pro se lawsuit he had previously filed had been dismissed. He became irrate [sic], and court security was called. As Palmer was leaving the building, he threatened to kill a court security officer ("CSO") who had attempted to retrieve his visitor's badge. Federal authorities, including FBI Agent McNulty, were subsequently sent to Palmer's house to arrest him. Though Palmer initially resisted, he was eventually subdued and arrested; he had a semi-automatic handgun in his back pocket.

On October 29, 2003, Palmer was indicted on one count of threatening to murder a federal official, in violation of 18 U.S.C. §115(a)(1)(B). He was found to be incompetent to stand trial, and committed to Butner Federal Medical Center ("Butner FMC") for a mental health evaluation. Dr. Angela Walden-Weaver, a clinical psychologist, and Dr. Robert Lucking, a psychiatrist, issued a report of their evaluation in August 2004, concluding that Palmer was suffering from a delusional disorder. Palmer was then referred for an evaluation to determine whether he was eligible for civil commitment under 18 U.S.C. §4246. During that evaluation, he stated that

he had no interest in acquiring another weapon, and based on that statement, as well as community support and his lack of a violent history, the clinicians found that Palmer's release would not create a substantial risk of bodily injury to another person or serious damage to the property of others. The indictment against Palmer was dismissed on November 19, 2004.

Less than a month later, Palmer bought a gun at a pawn shop in Baton Rouge. On the form accompanying the purchase, he falsely answered "no" to the question of whether he had ever been adjudicated mentally incompetent or committed to a mental institution.

On May 12, 2005, U.S. marshals, when securing the campus of Louisiana State University Law School for a Federal Bar Association seminar scheduled to be held there, found Palmer sitting in the driver's seat of a vehicle in the parking lot. When the marshals approached the vehicle and requested to speak with him, Palmer stated: "I know who you are and I am calling the police." The marshals observed a gun on the front passenger seat, and drew their weapons and ordered Palmer out of the car. He disobeyed, and instead began driving away. The marshals pursued him, and he was apprehended. After they placed him under arrest, the marshals searched his vehicle, finding a firearm as well as a box of pistol ammunition and a loaded pistol magazine.

On May 26, 2005, Palmer was indicted on one count of possession of a firearm by a person adjudicated mentally defective, in violation of 18 U.S.C. §922(a)(6), and one count of possession of a firearm and ammunition by a person that has been adjudicated as mentally defective and committed to a mental institution, in violation of 18 U.S.C. §922(g)(4). Palmer's appointed counsel filed a motion to determine competency and notice of intent to use the insanity defense. The district court appointed Dr. John Thompson, Jr., Chief of Staff of the Eastern Louisiana Mental Health System and Vice Chair of Adult Psychiatry and Director of Forensic Neuropsychiatry at Tulane University, to examine Palmer and file a report with the court.

In his report, Dr. Thompson found that Palmer was incompetent to stand trial because he did not have a complete awareness of the charges against him, nor did he appreciate the seriousness of the charges. Dr. Thompson diagnosed Palmer with a form of schizophrenia. His report concluded that Palmer presented a danger to the public, and recommended that he be returned to Butner FMC with an order for forced medication. On August 18, 2005, the district court remanded Palmer to the custody of the Attorney General for an evaluation of his competency to stand trial.

Palmer was returned to Butner FMC, and once again evaluated by Dr. Walden-Weaver and Dr. Lucking, who also diagnosed him with a form of schizophrenia. In their

report, the doctor recommended involuntary medication to render him competent to stand trial. Thereafter, Palmer filed a motion for a competency hearing, while the Government filed a motion to involuntarily medicate Palmer to restore his competency for trial.

The magistrate judge conducted a competency hearing on February 2, 2006. The parties jointly introduced the reports from Palmer's previous evaluations, and stipulated that the sentencing guidelines range for the charged offenses was from fifteen to twenty-one months. Dr. Lucking testified for the Government, recommending that Palmer receive Haldol injections to restore competency. While he acknowledged that there were newer anit-psychotic drugs with less serious side effects available, Dr. Lucking testified that he preferred Haldol because of its overall efficacy. Dr. Thompson testified on behalf of Palmer. He also recommended involuntary medication, but preferred the use of a second-generation anti-psychotic drug, although he agreed that both Haldol and the newer medications would be sufficiently safe and effective. Agent McNulty testified about the charges brought against Palmer in 2003.

The magistrate judge issued a thorough and detailed report and recommendation where he found Palmer incompetent to stand trial and recommend involuntary medication to restore his competency. The district court adopted the magistrate judge's recommendation and, over Palmer's objection, granted the motion. Palmer now appeals.

II. DISCUSSION

Even though the United States Supreme Court has recognized that inmates have an "important, constitutionally protected liberty interest in avoiding unwanted administration of antipsychotic drugs," it has held that involuntary medication doe not violate the due process clause if the inmate is a danger to himself or others and treatment is in the inmate's medical interest. Washington v. Harper, 494 U.S. 210, 221, 226 (1990). In Sell v. United States, the Court explained that the involuntary medication of a defendant solely to render him competent to stand trial for a serious, but nonviolent, crime is permissible in rare circumstances, "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. 166, 179 (2003). The Court declared that lower courts, when making such a determination must consider four factors: (1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate. Id.

Palmer does not contest the district court's finding that the administration of

drugs is medically appropriate.[1] Thus, the issue before this court is whether the district court properly assessed the other three Sell factors: (1) that important governmental interests are at stake; (2) that involuntary medication will further the government's interest; and (3) that forced medication is necessary to further the government's interest. We have not had a prior opportunity to consider the government's interest. We have not had a prior opportunity to consider the appropriate standard of review for Sell cases. However, the Second Circuit has determined that whether the government's asserted interests are sufficiently important is a legal issue subject to de novo review, while the other Sell factors involve factual findings which are reviewed for clear error. United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004). We formally adopt the standard set forth in Gomes, and apply it in this case.

In Sell, the Court recognized that there is an important governmental interest in ensuring that individuals accused of serious crimes are brought to trial. 539 U.S. at 180. In this case, the Government argues that the offense for which Palmer was charged is serious, as he faces a maximum sentence of ten years and his behavior created a substantial risk of harm to himself and others. Palmer contends that because his United States sentencing guidelines range is only fifteen to twenty-one months, the Government

---

[1] He does not argue that in the event he is involuntarily medicated, the newer drugs, rather than Haldol, should be used.

is characterizing his crime more seriously than it actually was. While that may be, Palmer's argument still fails. Not only have courts held that crimes authorizing punishments of over six months are "serious," they have also concluded that it is appropriate to consider the maximum penalty, rather than the sentencing guidelines range, in determining "seriousness" in involuntary medication proceedings. See United States v. Evans, 404 F.3d 227, 237-38 (4th Cir. 2005); United States v. Algere, 396 F. Supp. 2d 734, 739 (E.D. La. 2005). Furthermore, given the fact that Palmer threatened the life of a federal officer and caused substantial disruption on and near the LSU campus, it is possible a court may find it appropriate, if he is convicted, to upwardly depart from the guidelines recommended sentencing range. Thus, we cannot conclude that the district court erred by finding that important governmental interests are at stake.

Neither do we conclude that the district court clearly erred by finding that Palmer's involuntary medication will significantly further the government's interest. In Sell, the court explained that this factor requires that the trial court to determine that the administration of the drugs is substantially likely to both render the defendant competent to stand trial as well as substantially unlikely to have side effects that would significantly interfere with the defendant's ability to assist his counsel. 539 U.S. at 181. Palmer argues that the lower court attached too little significance to the dangerous side effects accompanying the administration of anit-

psychotic drugs, particularly Haldol. Dr. Lucking testified that there is a one-in-three chance that Palmer could develop extrapyramidal symptoms, such as tardive dyskinesia (involuntary movements) and akathisia (restlessness), if he is forced to take Haldol. While the newer drugs do not have as many neurological side effects, there are other, mainly metabolic, side effects associated with those as well. Yet, all the doctors who testified at the hearing agree that no matter which drug is used, in the vast majority of cases the side effects can be treated or minimized. Palmer's argument fails because while he has demonstrated that the side effects will be unpleasant, he has not shown how his ability to assist in his defense will be substantially undermined by the medication.

Finally, we turn to the last factor: whether forced medication is necessary to further the government's interest. The Supreme Court has instructed that courts must only involuntarily medicate a defendant if "alternative, less intrusive treatments are unlikely to achieve substantially the same result." Id. It is undisputed that other treatment options, such as psychotherapy or education would be ineffective in restoring Palmer's competency. However, Palmer asserts that before resortin to involuntary medication, he should be reevaluated for civi commitment. He also argues that if he is made competent it is probable that the will be found not guilty by reason of insanity, and even if he is convicted, given that he has not been confined since May 2005, he will likely have

already served his sentence. While there is some force to Palmer's contentions, we cannot concluded that the district court's determination was clearly erroneous. Palmer was considered for civil commitment in 2004 and found not to be a suitable candidate at that time. It is possible that a similar outcome will result if he is evaluated again. Additionally, despite the fact that Palmer may serve very little, and possibly no, prison time even if he is tried, the governmental interest, as the court explained in Sell, is not in seeing him convicted, but rather in ensuring that he is brought to trial. Id. at 180 ("Power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace" (quoting Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J. concurring))). Because Palmer can only be brought to trial if he is competent, involuntarily medication is necessary under the circumstances of this case.

III. CONCLUSION

Because we find that the record in this case supports the need to involuntarily medicate Palmer in order to render him competent to stand trial, we AFFIRM the district court's judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-31018

U.S. COURT OF APPEALS
FILED
NOV 27 2007
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WAYNE LEE PALMER
Defendant-Appellant

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion 10/31/07, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, JOLLY, and STEWART, Circuit Judges

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Reahearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Ban is DENIED.

ENTERED FOR THE COURT:
S/ CARL E. STEWART
United States Circuit Judge

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NO.

IN THE

Supreme Court of the United States

WAYNE LEE PALMER
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Sell v. United States* permit the medication of an incompetent defendant solely to render him competent to stand trial when he is accused of a non-violent crime and the only government interest put forth is the desire to prosecute criminal offenders?

PARTIES TO THE PROCEEDING

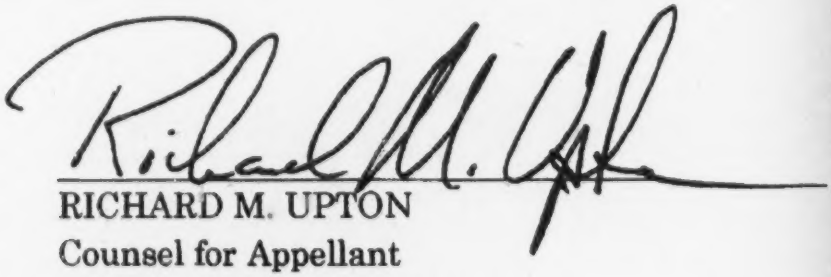
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of these proceedings.

Appellant: Wayne Lee Palmer (04083-095), Butner Federal Medical Center, P.O. Box 1600, Butner, North Carolina 27509

Attorney for Appellant: Richard M. Upton, 436 Government Street, Baton Rouge, Louisiana 70802

Appellee: United States of America

Attorney for Appellee: Catherine Maraist, 777 Florida Street, Suite 208, Baton Rouge, Louisiana 70801



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OPINIONS AND ORDERS

United States v. Palmer, 507 F.3d 300 (C.A.5 (La.),2007)

STATEMENT OF JURISDICTION

The order of the Middle District of Louisiana originally appealed was issued on September 20, 2006 by United States District Judge Lance M. Africk. That order was appealed to the United States Fifth Circuit Court of Appeals by Notice of Appeal filed on September 22, 2006. The Fifth Circuit Court of Appeals issued its opinion on October 31, 2007 and a petition for rehearing *en banc* was timely filed and subsequently denied on November 27, 2007. This petition for certiorari was subsequently filed.

The Supreme Court has jurisdiction to review this case under the appellate jurisdiction established in Section 2, Article III of the Constitution of the United States of America.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §922. Unlawful acts– "(a) It shall be unlawful--

"(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter..."

18 U.S.C. §922. Unlawful Acts—"(g) It shall be unlawful for any person—

"(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;...

"to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

A. Proceedings Below

Mr. Palmer was indicted by a United States Grand Jury for the Middle District of Louisiana on May 26, 2005, for a violation of 18 U.S.C. §922(a)(6) and 18 U.S.C. §922(g)(4). Record (R.) pp. 29 & 30. The defendant was found to be indigent and counsel was appointed to represent him. R. pp. 23. Due to the circumstances of Mr. Palmer's arrest, all judges of the Middle District recused themselves and Judge Lance Africk and Magistrate Louis Moore, Jr. of the Eastern District were assigned to hear the case. On June 14, 2005 defense counsel filed a motion to determine competency and notice of intent to use the defense of insanity. R. pp. 44. A hearing on the defense motion was held on August 18, 2005. The court ruled that the defendant was incompetent to assist counsel and remanded him to the custody of the Attorney General for further evaluation pursuant to 18 U.S.C. §4241(d). On December 19, 2005 the defendant filed a motion for a competency hearing under 18 U.S.C. §4241(d)(1). On January 6, 2006 the United States filed a motion to involuntarily medicate the defendant to render him competent to stand trial. A hearing was held on February 2, 2006 before the Magistrate Judge who issued a report and recommendation that the United States motion be granted. The defendant objected to that recommendation. The District Judge entered the order on September 21, 2006 granting the United States motion for involuntary medication. The defendant appealed that order to the United States Fifth Circuit Court

of Appeals and was denied. *United States v. Palmer*, 507 F.3d 300 (C.A.5 (La.),2007).
His petition for rehearing *en banc* to the Fifth Circuit was denied as well. The defendant now appeals that order to the United States Supreme Court.

B. Statement of the Facts

Mr. Palmer was initially brought to the attention of Butner FMC and its doctors in 2003 after he was arrested for verbally threatening a court security officer as he was being escorted from the Federal Courthouse for the Middle District of Louisiana. Mr. Palmer was indicted on this charge in October, 2003 and was subsequently found to be incompetent to stand trial. He was sent to Butner for further evaluation by Drs. Angela Walden Weaver and Robert Lucking. Both determined that, at the time, he was not a valid candidate for civil commitment nor would be a threat to the community if released. The doctors took into account both the community support available to the defendant as well as his lack of a violent history. He was diagnosed with delusional disorder persecutory type with a rule out diagnosis of schizophrenia undifferentiated type. The defendant was released in November, 2004.

After his release, Mr. Palmer purchased a firearm at a pawn shop in Baton Rouge and responded in the negative when asked if he had ever been adjudicated mentally incompetent or committed to a mental institution.

Mr. Palmer was arrested in May, 2005 when several U.S. Marshals, while attempting to secure

the campus of the Paul M. Hebert Law Center at Louisiana State University, approached Palmer who had been sitting in his vehicle in the parking lot. He stated: "I know who you are and I am calling the police." The marshals saw a gun on the passenger seat and pulled their weapons, ordering Mr. Palmer out of the car. He began to drive away but was apprehended shortly thereafter. He was subsequently charged with one count of possession of a firearm and ammunition by a person adjudicated as mentally defective and committed to a mental institution, in violation of 18 U.S.C. §922(g)(4). Dr. John Thompson was appointed by the court to examine Palmer after Palmer's appointed counsel filed a notice of intent to plead not guilty by reason of insanity. Dr. Thompson felt that Palmer was incompetent to stand trial and included a recommendation for involuntary medication after diagnosing Palmer with paranoid schizophrenia, chronic type. Mr. Palmer was found to be incompetent to stand trial and was once again committed to Butner for evaluation. Dr. Walden Weaver and Dr. Lucking examined Palmer when he was returned to Butner. He was diagnosed by Dr. Walden Weaver with delusional disorder persecutory type and schizophrenia, paranoid type. Dr. Lucking diagnosed Mr. Palmer with schizophrenia, undifferentiated type. Both doctors recommended involuntary medication with antipsychotics to render Palmer competent to stand trial.

ARGUMENT

Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174 (2003) established the rules regarding medication of incompetent criminal defendants for the sole purpose of rendering them competent to stand trial. This Court in that case stated that:

> ...the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing **serious criminal charges** in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is **necessary significantly to further important governmental trial-related interests**.

Sell, 539 U.S. at 179 [emphasis added].

It has been left to the District Courts and Courts of Appeal to determine how to apply this standard. The question that faces the court in this case is the use of the words "serious" and "necessary significantly to further important governmental trial-related interests." The second quotation has often been shortened by the District and Circuit Courts to require that the involuntary medication order will "significantly further important governmental interests."

It is beyond argument that the Government has a strong interest in prosecuting those accused of crime in order to determine their guilt or innocence. The criminal justice system would fail entirely were that not the case. The problem is that in a case involving a mentally incompetent defendant there are other questions to be taken into account.

An individual who has been accused of a crime has certain Constitutional rights guaranteed him: the right to be free from self-incrimination, the right to due process, the right to counsel and the right of confrontation, as well as the right to be free from cruel and unusual punishment. U.S. Const. amend. 8. Under the Due Process Clause of the Fifth Amendment, a criminal defendant may not be "deprived of life, liberty, or property, without due process of law." *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). The right to Due Process has been held by this Court to encompass a wide range of procedural rights. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ; *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971). A defendant who has been charged with a crime must be arraigned within a certain amount of time from his initial arrest, he must have a hearing on the issue of bail, he must be entitled to counsel for purposes of making his arguments to the court and he must be provided a trial in which to make his case. U.S. Const. amend. 6; U.S. Const. amend. 8; *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.ed.2d 799 (1963); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1962);

The defendant in this case faces further complications however. This defendant not only is entitled to the same due process requirements as are all other criminal defendants, but he faces the added challenge of having been found to be mentally incompetent. More specifically, he has been diagnosed with paranoid schizophrenia. The defendant has been incarcerated at Butner FMC twice and both times he has been found incompetent to stand trial. The first time he was incarcerated at Butner his charges were dismissed as a result of his incompetence and he was released from federal custody. The second incarceration is before the Court in this case.

A. The standard for gauging the seriousness of the defendant's offense remains unarticulated by this Court leading to disparities among the lower courts.

This Court has articulated a set of steps to follow when making a determination about involuntary medication but has still left the standard open to various interpretations by the District and Circuit Courts by declining to define the limitations of the term "serious" with regard to the alleged crime.

The Government, in briefs to the lower courts in this case, has suggested that "serious" should be read to mean any conduct that is categorized as a felony. Defendant concedes that the Court has often meant felonies when using the

term "serious" in the past; however, this definition does not meet the stringent requirements set later in the test. One should read the *Sell* test in its entirety to come to an understanding regarding the words used and their meaning.

Some confusion seems to have developed among the District and Circuit Courts over the exact meaning of "serious" in *Sell*. In *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005), the Tenth Circuit Court of Appeals found that because the defendant faced up to 50 years imprisonment if convicted, the charges against him were "serious" for *Sell* purposes. *Bradley*, 417 F.3d at 1114. That court went on to discuss the special circumstances present in the case before it as required by *Sell*. This Court offered two examples of special circumstances that might impact the determination of governmental importance:

> "[1] a defendant, in the absence of court-ordered administration of psychiatric medication, might suffer lengthy civil commitment for mental illness "that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime'"

Bradley, 417 F.3d at 1116; or:

> [2] a defendant may have already been confined for a lengthy period of time pending a determination of competency, confinement for which he or she would receive credit against any sentence ultimately imposed. As

> we read *Sell*, this latter example suggests that when the amount of time the defendant is confined pending determination of competency is in parity with an expected sentence in the criminal proceeding, the Government may no longer be able to claim an important interest in prosecution.

Bradley, 417 F.3d at 116 [Finding that the first example did not apply because the defendant was not a candidate for civil commitment nor did the second example apply because less than 9 months had elapsed between defendant's commitment and the order]. Several of the District Courts have followed this reasoning, finding that the "expected sentence" under the Guidelines should be considered, rather than the statutory maximum, when evaluating the "seriousness" of a crime under *Sell*. *See United States v. Thrasher*, 503 F.Supp.2d 1233, 1237 (W .D. Mo., 2007) (citing *United States v. Schloming*, 2006 WL 1320078 (D. N. J. 2007) (followed in *United States v. McCray*, 272 F.Supp.2d 671 (D. N. J. 2007)).

The Ninth Circuit in *United States v. Hernandez-Vasquez*, 506 F.3d 811 (9th Cir., 2007), though deciding the appeal on different grounds, chose to discuss the Governmental interest prong of the *Sell* test in an attempt to give the District Court some guidance on remand.

> Other circuits have refrained from specifying a length of sentence that renders a crime serious. The Fourth Circuit has held that 'it is appropriate to focus on the maximum

> penalty authorized by statute in determining if a crime is "serious" for involuntary medication purposes.' *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005). It reached this conclusion on the basis of the Supreme Court's Sixth Amendment jurisprudence with respect to the right to trial by jury...The Second and Tenth Circuits also have refrained from establishing a generic test for seriousness, but, in contrast to the Fourth Circuit, have not rejected the sentencing guidelines as a guide to the seriousness of a crime. *See* [*United States v.*] *Valenzuela-Puentes*, 479 F.3d [1220] at 1226 [(10th Cir. 2007)] (reasoning that '[w]hether a crime is "serious" relates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he is charged,' and analyzing seriousness in light of both the statutory maximum and the likely guideline sentence); [*United States v.*] *Gomes*, 387 F.3d [157] at 160 [(2nd Cir. 2004)] (describing 'the seriousness of the crime and [the defendant's] perceived dangerousness to society [as] evident from the substantial sentence [the defendant] faces if convicted' and noting that the defendant 'faces a possible statutory minimum of fifteen years' imprisonment'), *cert. denied*, 543 U.S. 1128, 125 S.Ct. 1094, 160 L.Ed.2d 1081 (2005).

Hernandez—Vasquez, 506 F.3d at 820-21. On rehearing in *United States v. Hernandez-Vasquez*, --- F.3d ---, 2008 WL 170201 (9th Cir. 2008), the

Ninth Circuit stated that even though the Supreme Court had just reiterated that the sentencing guidelines themselves were only advisory, "they are the best available predictor of the length of a defendant's incarceration." *Hernandez-Vasquez*, --- F.3d at 9.

> "While the statutory maximum may be more readily ascertainable, any difficulty in estimating the likely guideline range exactly is an insufficient reason to ignore *Sell*'s direction that courts should consider the specific circumstances of individual defendants in determining the seriousness of a crime. Accordingly, we disagree with the Fourth Circuit and conclude that the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness."

Id. The court then concluded that other factors, including the defendant's prior offenses, predatory nature of those offenses, and proximity in time of prior offenses to the current prosecution should be considered in conjunction with the likely guideline range. *Id.*

Other Districts and Circuits have focused on the statutory maximum when determining the whether a crime is "serious" under *Sell*. The Fourth Circuit in *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005), is the case most often cited for the proposition that the *Sell* court intended the District Courts to rely on the statutory maximum for a determination of "seriousness".

> Although the Court in *Sell* offered no guidance on how to determine the seriousness of an offense, the Supreme Court has described 'serious' crimes in other contexts. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), for example, the Supreme Court observed that the Sixth Amendment's right to trial by jury exists only in 'serious' criminal cases. *Id.* at 158, 88 S.Ct. 1444. It admonished that 'the penalty *authorized* for a particular crime is of major relevance in determining whether it is serious.' *Id.* at 159, 88 S.Ct. 1444 (emphasis added). In fact, it explicitly rejected Louisiana's argument that the proper focus of whether a crime is 'serious' for purposes of the Sixth Amendment right to trial is the *actual* 'length of punishment.' *Id.* at 162 n. 35, 88 S.Ct. 1444. More recent right-to-jury cases have explicitly found that the primary measure of seriousness is 'the maximum penalty attached the offense.' *See, e.g., Lewis v. United States*, 518 U.S. 322, 326, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

Id. at 237. The court went on to conclude that in light of the aforementioned cases, it was appropriate to consider the statutory maximum when determining the seriousness of a crime for purposes of *Sell*. *Id.*

Several District Courts have followed the Fourth Circuit's lead in using the statutory maximum to determine whether a crime is serious.

See United States v. Algere, 396 F.Supp.2d 734 (E. D. La., 2005) ("[The defendant] is charged with...a felony carrying a maximum term of imprisonment of ten years. The Court concludes that this is a "serious" offense."); *United States v. Dallas*, 461 F.Supp.2d 1093 (D. Neb., 2006) ("The seriousness of a crime is measured by its maximum statutory penalty."); and *United States v. Sanchez-Cruz*, Slip Copy, 2007 WL 419 0692 (W. D. Tex., 2007).

Sell requires that the defendant have committed a serious crime **and** that the Government show that involuntary medication is necessary significantly to further important government trial-related interests. The fact that this Court chose to include both of these requirements suggests that the simple fact that a crime is classified as a felony, or that the statutory maximum sentence is 10 years or more, is not the end point of the seriousness analysis. Further to end the disparities among the District and Circuit Courts, this Court must inform them what is meant by the word "serious" in the *Sell* test.

B. The applicable standard should be the "likely" sentence under the Guidelines, rather than the statutory maximum.

This Court now has the opportunity to clear up the confusion among the lower courts by establishing a uniform standard for measuring the "seriousness" of a crime under *Sell*. The various arguments put forth by the lower courts on both sides of this debate make valid points; however,

this Court's language in *Sell*, itself, suggests that the intent of the Court was to establish a standard separate and apart from that standard established in its Sixth Amendment right-to-jury-trial jurisprudence.

This Court requires, in *Sell*, that a court intending to issue an involuntary medication order must consider the facts of individual cases in evaluating whether or not the Government has an important interest in prosecuting the defendant. *Sell*, 539 U.S. at 180. This requirement suggests that this Court's intent was for the district courts to consider the facts of those cases with regard to sentencing as well. It is only logical that if the facts of a particular defendant's case are to be take into consideration when determining the government's interest, and the serious of the charges against the defendant are part of the facts of his case, and sentencing is to be a consideration, as it rightly should be, then the likely sentence for that particular defendant should be considered. It is illogical to consider all the facts of a defendant's case and then consider the statutory maximum for the crime he has committed when his likely sentence may be dramatically lower than the statutory maximum. As the Ninth Circuit stated in *Hernandez-Vasquez*, --- F.3d at 9, the fact that it may simply be easier to look to the statutory maximum than to estimate the likely guidelines range does not make it permissible for the district courts to ignore the fact that *Sell* requires them to analyze the "specific circumstances of individual defendants in determining the seriousness of a crime." *Id.*

C. Once this Court has established that the standard for seriousness is the likely sentence the defendant will receive, it should vacate the involuntary medication order in this case for failure to meet the requisite standard.

The *Sell* test requires that the Government show that the involuntary medication of the defendant is "necessary significantly to further important governmental trial-related interests. The *Sell* test sets out that the treatment must be medically appropriate, it must be substantially unlikely to have side effects that may undermine the fairness of the trial, and, must be necessary significantly to further important governmental trial-related interests. It is not argued here that the treatment would not be medically appropriate nor that the side effects would be so disruptive to the proceedings that it would render the trial unfair. It is being argued; however, that the defendant's crime is not so serious, taking into account all of the circumstances of the defendant's case, and therefore does not satisfy the very first requirement for involuntary medication under *Sell*.

The defendant was arrested for possession of a firearm by a person adjudicated a mental defective and previously committed to a mental institution, a violation of 18 U.S.C. §922(g)(4). He was arrested while sitting in the parking lot of the Louisiana State University Law School with a firearm on his passenger seat. Coincidentally, the

U.S. Marshals were attempting to secure that location for a federal judiciary convention that was to be held there later that day. When they noticed the defendant, they approached and brandished their weapons. The defendant never reached for his. He attempted to leave the situation and was apprehended shortly thereafter. The defendant was placed under arrest, never once having attempted any violent act with his weapon.

Further, the defendant has no violent criminal history. He was arrested once before for verbally threatening a court security officer, but his threats were made only subsequent to the security officer's physical contact with the defendant in an attempt to remove his security badge. The charges were dropped as a result of the defendant's incompetence.

The likely sentence the defendant will receive is 15 to 21 months, as stipulated by the parties at the trial court. He has already been incarcerated for over 21 months and will have to be incarcerated even longer before trial if the involuntary medication order is enforced (testimony at the Hearing on the Motion to Involuntarily Medicate stated that it would take four months from the first administration of the medication to ensure that the defendant was being positively affected by the medication). The fact that the defendant has served longer than the high-end of the guidelines range at this time suggests that the government's interest in medicating this defendant for purposes of trial are not very strong.

Taking all of these factors together, the lack of "seriousness" based on the defendant's likely sentence as well as the government's interest in prosecuting the defendant in consideration of the lengthy time he has been incarcerated already suggests that the order for involuntary medication should be vacated and the defendant released from custody.

CONCLUSION

The defendant respectfully requests that this Court grant certiorari and reverse the Order for Involuntary Medication of the Defendant in order to render him competent to stand trial.

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Supreme Court, U.S.
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(2)

NO.

IN THE

Supreme Court of the United States

WAYNE LEE PALMER
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD M. UPTON
Counsel of record
Law Firm of Richard M. Upton
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Baton Rouge, LA 70802
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U.S. DIST. COURT
MIDDLE DIST. OF LA

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

INDICTMENT FOR MAKING A FALSE STATEMENT TO A FIREARMS DEALER, AND POSSESSION OF A FIREARM BY A PERSON ADJUDICATED AS A MENTAL DEFECTIVE AND HAVING BEEN COMMITTED TO A MENTAL INSTITUTION

UNITED STATES OF AMERICA

versus

WAYNE LEE PAMER

CRIMINAL NO.; 05-121-D-M3

18 U.S.C. §922(a)(6)
18 U.S.C. §922(g)(4)

THE GRAND JURY CHARGES:

COUNT ONE

On or about December 16, 2004, in the Middle District of Louisiana, WAYNE LEE

PALMER, defendant herein, in connection with the acquisition of a firearm, that is, a Hi-Point, model C9, 9mm pistol, bearing serial number P1218714 from Pelican Pawn Shop, 2646 Florida Boulevard, Baton Rouge, Louisiana, a licensed dealer of firearms, did knowingly make a false and fictitious statement to said dealer, which statement was intended and likely to deceive the dealer with respect to a fact material to the lawfulness of the said acquisition of the firearm under the provisions of Chapter 44 of Title 18, United States Code, in that WAYNE LEE PALMER, represented that he had not been adjudicated mentally defective, whereas, in truth and in fact, WAYNE LEE PALMER then and there well knew that on March 11, 2004, in Criminal No. 03-192-C-M1, the Honorable United States District Court Judge Adrian G. Duplantier, found that WAYNE LEE PALMER was suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings and unable to properly assist in his defense, and committed WAYNE LEE PALMER to the custody of the Attorney Generall, namely the Federal Medical Center in Butner, North Carolina.

The above is a violation of Title 18, United States Code, Section 922(a)(6).

COUNT TWO

On or about May 12, 2005, in the Middle District of Louisiana, WAYNE LEE PALMER,

defendant herein, having been adjudicated as a mental defective and having been committed to a mental institution, knowingly did possess the following firearm and ammunition:

a. Hi-Point, model C9, 9mm pistol, bearing serial number P1218714;
b. Seven (7) rounds of CCI 9mm ammunition; and
c. Forty-eight (48) rounds of Remington 9mm ammunition

which firearm and ammunition had previously been shipped and transported in interstate commerce.

The above is a violation of Title 18, United States Code, Section 922(g)(4).

UNITED STATES OF AMERICA, by

_____

DAVID R. DUGAS
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF LOUISIANA

A TRUE BILL
REDACTED PER PRIVACY ACT
GRAND JURY FOREPERSON

_____

FREDERICK A. MENNER, JR.
ASSISTANT UNITED STATES ATTORNEY

_____

DATE

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MIDDLE DIST. OF LA
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UNITED STATES DISTRICT COUR
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO.: 05-0121
SECTION: "LMA" (LM)

REPORT AND RECOMMENDATIONS

The above captioned matted [sic] was referred to the undersigned Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition on the following motions:

1 – Defendant's Motion for Examination to Determine Mental Competency and

Notice of Intent to Use the Defense of Insanity (Doc. #31)'[1]

2 – Defendant's Motion for a Competency Hearing (Doc. #41);[2]

3 – United States of America's Motion for an Order for Involuntary Medication to Restore Competency (Doc. #48);[3]

---

[1] See Doc. #39, Minute Entry dated August 18, 2005, wherein the Magistrate Judge held a hearing and ruled as follows:

Based on the testimony of Dr. John W. Thompson, Jr., and his psychiatric report, the Court finds by a preponderance of the evidence that the defendant, Wayne Lee Palmer, is presently suffering from a mental disease or defect rendering him mentally incompetent, i.e. to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Thereafter, Palmer was ordered committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d). The Court also ordered the Attorney General to hospitalize the defendant for treatment in a suitable psychiatric facility for a reasonable period of time, not to exceed four (4) months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed.

[2] The United States had previously advised that medical personnel of the Federal Medical Center, Butner, North Carolina, agreed that the defendant was presently incompetent to stand trial and recommended involuntary medcation for purposes of restoring defendant's competence. See Doc. #44, United States' Response to Defendant's Motion for Competency Hearing.

[3] See Doc. #47, Minute Entry dated January 13, 2006, wherein the Magistrate Judge ordered a hearing be held on February 2, 2006, under the authorities of **Sell v. United States**, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) and **United States v. White**, 431 F.3d 431 (5th Cir. 2005) (Nov. 21, 2005). The issues to be addressed were defined as:

The Magistrate Judge ruled on the first motion. Accordingly, for the reasons and discussions that follow, the competency hearing is granted. It is recommended that the motion for an order for involuntary medication to restore competency be granted.

Background

On May 12, 2005, the defendant Wayne Lee Palmer was arrested near the Paul M. Hebert Law Center, Baton Rouge, Louisiana, by Deputy United States Marshals who were assigned there to provide security for federal judges expected to attend a Federal Bar Association Seminar. One of the Deputy Marshals recognized the defendant as an individual who had been previously arrested. The deputies noticed a black pistol on the front passenger seat of the vehicle and demanded that the defendant get out of the vehicle. The defendant began driving away but was apprehended and the firearm was seized. During the search of the vehicle, the deputies seized a box of ammunition, a loaded pistol magazine, $7,217.00 in U.S. currency and two Louisiana driver's licenses in the defendant's

---

Whether or not the United States should be orered to show cause why the defendant should be continued in the custody of the Attorney General of the United States for an additional period of time as provided in Title 18, United States Code, Section 4241(d)(2)(A)? Whether or not the Court should order the Federal Medical Center authorities to administer antipsychotic medication to the defendant on an involuntary basis in order to render the defendant competent to stand trial?

name. Defendant was charged in a criminal complaint and later indicted by a federal grand jury on one count of possession of a firearm by a person adjudicated mentally defective, in violation of Title 18, United State Code, Section 922(g)(4).[4]

Facts

The following is a summary of the testimony and evidence introduced during the competency hearing held on February 2, 2006.[5]

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[4] See Exhibit 10, Criminal Complaint. Petitioner had previously been arrested on April 14, 2003, and charged via complaint and subsequent grand jury indictment with one count of threatening to murder a federal official, in violation of Title 18, United States Code, Section 115(a)(1)(B). The facts leading to defendant's arrest started at the United States District Court (Courthouse) Middle District of Louisiana. Defendant's civil law suit had been dismissed and he was dissatisfied and proceeded to the Clerk's office to get an explanation. He became disorderly and threatened to kill a federal protective officer.

The court determined that defendant was incompetent to stand trial and ordered a mental health evaluation to be held at the Federal Medical Center in Butner, North Carolina. The medical staff at Butner issued its report and evaluation on August 11, 2004, finding that the defendant was suffering from delusional disorder, persecutory type. (See Exhibit 1, p.6) The clinicians opined that defendant's disorder was treatable with antipsychotic medication and they recommended involuntary medication. (See Exhibit 1, pp. 7-10) The District Court did not order involuntary medication. The defendant was referred for an evaluation to determine whether he was eligible for civil commitment pursuant to Title 18, United States Code, Section 4246. (See Exhibit 2.) After receipt of the clinician's civil commitment report, the indictment was dismissed and the defendant was released.

[5] See Record Doc. No. 53, Transcript of Competency Hearing, hereinafter referred to as T. ____. (page no.)

Angela Walden Weaver, Ph.D., a psychologist employed at the Federal Medical Center Butner, North Carolina, for eleven years, testified as an expert in the field of forensic psychology. (T. 11, 12, 14) Dr. Weaver evaluated the defendant Wayne Lee Palmer, on three separate questions. The first evaluation report is dated August 2004. (Exhibit 1)(T. 17.) Dr. Weaver's diagnosis of defendant was delusional disorder persecutory type with a rule-out diagnosis of schizophrenia undifferentiated type. (T. 18.) Dr. Weaver's opinion was that defendant was not competent. (T. 20, 29.) Some of Dr. Weaver's recommendations were to refer defendant to a competency restoration group, participation in psychological testing and that defendant consent to treatment with anti-psychotic medication. (T. 21.)

Dr. Weaver also was asked to perform an evaluation of whether the release of defendant from an institutional setting would create a substantial risk of bodily injury to other persons. See Exhibit No. 2 Report dated October 2004 (T. 21-22) and Report dated December 2005 Exhibit No. 4 (T. 30). The medical section of the reports were done by Dr. Lucking. In the October 2004 Report, Dr. Weaver opined that defendant was not a danger to the community. (T. 22.) However, in the December 2005 Report, Dr. Weaver opined that the defendant was not dangerous within the Federal Medical Center at Butner (T. 30-31.) Dr. Weaver expressed no opinion as to whether or not defendant presently poses a substantial risk of bodily injury to anyone

outside the institutional setting. (T. 31-32.) Since the defendant would not consent to be treated with medication, an administrative hearing (involuntary medication hearing) was held. The hearing was conducted by Jean P. Zula M.D., Chief Psychiatrist, FMC Butner, on December 21, 2005. Dr. Zula agreed with Dr. Weaver's and Dr. Lucking's diagnosis that Palmer suffers from a thought disordered mental illness, consistent with schizophrenia. Morevoer, Dr. Zula concluded that Palme does not meet criteria for admission of involuntary medication pursuant to the **Washington v. Harper** standard. (See Exhibit No. 4, pages 1-10; also see T. 31-33.)[6] Palmer did not wish to appeal the decision.

Robert George Lucking, M.D., a Board Certified Psychiatrist employed at the Federal Medical Center Butner, North Carolina, testified as an expert in general psychiatry and forensic psychiatry. (T. 42-45.) Dr. Lucking and Dr. Weaver worked on the evaluation of defendant Wayne Lee Palmer. Dr. Weaver performed the forensic evaluation and Dr. Lucking prepared the medical portion of the recent report. (T. 45-46, Exhibit 3.) His role was to look at the evaluation of the

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[6] See United States' Post-Hearing Brief, Doc. No. 56, page 7, where it was properly pointed out that "(P)ursuant to the Fifth Circuit's decision in **United States v. White**, 431 F.3d 431 (5th Cir. 2005), the clinicians found that the defendant did not present a danger to himself or others in a clinical setting and thus medication was not warranted as an alternative, i.e., non-competence grounds as set forth in **Washington v. Harper**, 494 U.S. 210 (1990). (Exhbit 3, p. 15)"; Also see 28 C.F.R., Section 549.43.

defendant and to recommend a treatment plan, especially any treatment plan that may include medication. (T. 46.) Dr. Lucking was familiar with Dr. Weaver's previous diagnosis of the defendant as delusional disorder persecutory type and the recent diagnosis by Dr. Weaver of the defendant with schizophrenia undifferentiated type. (T. 46-47.)

Based upon the recent diagnosis involving schizophrenia, Dr. Lucking and the medical team at Butner recommended treatment with antipsychotic medication. (T. 47.) It was Dr. Lucking's opinion "that treatment with antipsychotic medication would restore him to competency, is substantially likely to restore him to competency." (T. 48.) When asked for defendant's prognosis for improvement without treatment with antipsychotic medication, Dr. Lucking said:

> A Its very, very dim. People with a diagnosis of schizophrenia generally don't get better. Schizophrenia is a chronic, progressive illness. They continue to have symptoms. They have a decline in their level of functioning. They generally have chronic symptoms and they just don't get better.

Q Now in your medical opinion, are there any other less intrusive means available in a treatment of defendant that could achieve the same result? And I mean by "achieve the same result," render him competent and competent to stand trial, such as the administration of anti-psychotic medication?

A No. I don't think that – as I outlined in the report, other work to restore his competency. They're generally adjunctive treatments used in addition to medication to improve compliance, to improve understanding, and to improve level of functioning, social functioning.

Q Now I want to –

A Those –

Q I'm sorry.

A I was going to say that those treatments, those treatments will not attack and will not control the core symptoms of schizophrenia.

(See T. 49-50.)

Dr. Lucking said that there were three antipsychotic medications available for involuntary administration. First generation medications are haldol decanoate (generic name haloperidol decanoate) and fluphenazine decanote (trade name prolixin, T. 57). The second generation medication is risperidone consta (T. 50.) the difference between the first and second generaton antipsychotic medications is in the side effects. (T. 51.) The side effects from administration of first generation antipsychotic medications and the treatment of those side effects. (T. 51-57 and 64-70.) Dr. Lucking stated that he did not think the side effect, even if the defendant was non-responsive to the treatments for the side effects, would be a substantial impediment to his competency. (T. 73.)

The side effects of the administration of the second generation antipsychotic medication risperidone consta were discussed as being metabolic as opposed to the neurologic side effects of the first generation antipsychotic medications. (T. 57-58.) Dr. Lucking opined that treatment of the side effects of the second generation antipsychotics will not prevent a defendant from assisting in his own defense at trial. (T. 59.)

Dr. Lucking's treatment plan for the defendant would be the use of haldol decanoate in the range of around 150 milligrams to 200 milligrams given every four weeks for approximately four months. (T. 59, 61.) The reasons given by Dr. Lucking for the u se of haldol decanoate are: its easier to

monitor the individual; side effects can be treated more easily than those of risperidone, it can be very difficult to manage; haldol decanoate is highly effective; and, he had a lot of experience with it. (T. 59-60.) Dr. Lucking testified that it was medically appropriate to treat the defendant with an antipsychotic. (T. 61.) Dr. Lucking and Dr. Weaver have recommended involuntary medication of the defendant as he has refused their attempts to consent to voluntary medication. (T. 62-63.)

John W. Thompson, Jr., M.D., Chief of Staff of the Eastern Louisiana Mental Health System and Vice Chair of Adult Psychiatry and Director of Forensic Neuropsychiatry at Tulane University testified as an expert in the field of Neuropsychiatry. Dr. Thompson is Board certified in adult psychiatry, forensic psychiatry and addiction psychiatry. (T. 80-82.) Dr. Thompson evaluated the defendant and issued his report (Exhibit 5) on July 8, 2005, finding the defendant incompetent to stand trial. The diagnosis was not substantially different from that of Drs. Weaver and Lucking's diagnosis of the defendant. (T. 83-84.) Dr. Thompson recommended that the defendant be referred back to Butner and that he be force medicated by physicians. (T. 84.) Dr. Thompson testified that his recommendation is presently the same. Dr. Thompson disagrees with Dr. Lucking's recommendation of the administration of haldol to render the defendant competent to stand trial. It was Dr. Thompson's opinion that the administration of a second generation antipsychotic medication

would minimize the risk of tardive dyskinesia and the neurologic side effects that occur with first generation medication. (T. 86-87.) Dr. Thompson said he thinks that 90% of state medical centers in the country use second generation treatment medication rather than the first generation medication. (T. 88.) Moreover, Dr. Thompson opined: that medication, even forced medication is appropriate for the defendant (T. 93); that the administration of antipsychotic medication is medically appropriate to render the defendant competent to stand trial (T. 95-96); and, that the side effects of the medications, for the most part, can be treated and the defendant can go to trial as the side effects will not affect his trial court demeanor, in the vast majority of cases. (T. 96.)

Special Agent Thomas M. McNulty, an employee of the Federal Bureau of Investigation, testified that he investigated allegations on October 16, 2003, that the defendant had threatened Judge Polazoa [sic] and William Thomas, a security officer. (T. 107.)[7] After obtaining an arrest warrant, Agent McNulty and other law enforcement officers went to arrest the defendant from his residence. The defendant was observed standing on his porch and when he saw the

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[7] During cross-examination, Agent McNulty agreed that the name Judge Polozola, in relation to a threat came from an interpretation of a comment by Mr. Lawrence Talamo, not from the words directly from the mouth of Mr. Palmer. (T. 119.) Moreover, the formal charge was not based on a threat made against Judge Polozola but a threat against court security officer William Thomas. (T. 120.)

officers, defendant went into his house and came out with something in his hand that the agent thought to have been a gun or a cell phone. (T. 111-112.) Thereafter, Agent Gaines said "He's got a gun. He's got a gun." Agent McNulty ordered defendant to raise his hands but defendant refused and kept his hands near his waist where Agent McNulty thought defendant had placed a gun. The defendant resisted the arrest and began to fight. He was subdued and a semi-automatic handgun was found in his back pocket. (T. 113-115.) After placing defendant into the back of the agent's vehicle, defendant became very irate and appeared to be completely out of touch with reality. (T. 115.)

Applicable Law

The applicable law section of this report is taken in part, from **United States v. Algere**, 396 F. Supp. 2d 734, 738-739 (E.D. La. July 5, 200) (Vance, D.J.) after study and research.

An individual has a constitutionally protected liberty interest in rejecting medical treatment. *See* **Washington v. Harper**, 494 U.S. 210, 211, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (recognizing "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs"); **Riggins v. Nevada**, 504 U.S. 127, 134, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (repeating that there is a constitutionally protected "interest in avoiding involuntary

administration of antipsychotic drugs"). Such medication may be forcibly administered, however, in certain circumstances. In **Harper**, for example, the Supreme Court held that administering antipsychotic drugs against a prison inmate's will does not violate Due Process Clause "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." **Harper**, 494 U.S. at 227, 110 S.Ct. 1039-40. Here, however, the administrative hearing resulted in a determination that forcibly medicating Palmer is not warranted or dangerousness grounds under **Harper** because Palmer is not dangerous to himself or others in his current prison environment. The government does not challenge that determination. Accordingly, it is undisputed that this request involves the involuntary administration of medication to a non-dangerous defendant solely for the purposes of restoring him to competency for trial, which places it squarely within the standard set forth by the Supreme Court in **Sell v. United States**, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In **Sell**, the Court concluded that the government may involuntarily administer antipsychotic drugs "to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial" if certain conditions are met. **Id.** at 179, 123 S.Ct. 2174. Such treatment is authorized only if it "is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is

necessary significantly to further important governmental trial-related interests." **Id.** The Court indicated that this standard requires consideration of four factors: (1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate. **Id.** at 180-81, 123 S.Ct. 2174. Although the Court did not address the standard by which the Government must establish these factors, at least one other circuit has concluded that the government must present clear and convincing evidence. **United States v. Gomes**, 387 F.3d 157, 160 (2nd Cir.2004), cert. denied, 543 U.S. 1128, 125 S.Ct. 1094, 160 L.Ed.2d 1081 (2005).

Analysis

1. Important Government Interests

The first criterion of the **Sell** analysis requires the Court to "find that important governmental interests are at stake." **Sell**, 539 U.S. at 180, 123 S.Ct. at 2184. "[T]he government's interest in bringing an individual accused of a serious crime is important. **Id.** The Court in **Sell** gave examples of special circumstances which "may lessen the importance of that interest" such as, the defendant's refusal to take drugs voluntarily may result in lengthy civil confinement in an institution for mentally ill

and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. **Id.** The potential for future confinement affects, but does not totally undermine the strength of the need for prosecution. The Court instructed, "the same is true of the possibility that the defendant has already been confined for a significant period of time." **Id.** The government has an interest in assuring that the defendant's trial is a fair one. **Id.**

In the case of **United States v. Algere**, 396 F.Supp.2d at 739, Judge Vance noted that in determining whether a crime is "serious" for purposes of **Sell**, courts have looked to the jurisprudence addressing the Sixth Amendment right to a jury trial. Judge Vance determined that existing precedent indicated that a "serious" offense is one for which a defendant may be sentenced for more than six months. **Id.** Judge Vance further noted that most of the courts which have considered whether an offense is "serious" in the context of a involuntary medication proceeding have focused on the maximum penalty that can be imposed for the offense, rather than the probable sentencing guideline range. **Id.** See also **United States v. Evans**, 404 F.3d 227 (4th Cir. 2005) (finding that charge of threatening to murder federal judge, a felony whose maximum term of imprisonment is 10 years, constitutes a "serious crime").

The defendant Wayne Lee Palmer stands accused of a serious crime, one which

would justify the governmental interest in this case. The underlying charge – possession of a firearm by one adjudicated as mental defective under Title 18, United States Code, Section 922(g)(4) – carries a maximum sentence of ten years. Other courts have found that the illegal possession of a firearm is a serious crime for which involuntary medication would be warranted. See, e.g., **Algere, supra** (felon in possession of a firearm); **United States v. Martin**, 2008 WL 1895110 (W.D. Va. Aug. 10, 2005) (charges under District of Columbia laws including possession of an unregistered firearm, carrying a handgun without a license and unlawful possession of ammunition); **United States v. Gomes**, 187 F.3d 157 (2d Cir. 2004) (possession of a firearm by a convicted felon; defendant qualified as an armed career criminal under Title 18, United States Code, Section 924(e)). But see **United States v. Dumeny**, 295 F.Supp. 2d 131, 132-133 (D. Me., 2004) (where it was held that possession of a firearm by one committed to a mental institution (a violation of Title 18, United States Code, Section 922(g)(4)) was not a serious enough crime to merit involuntary medication of a defendant for trial competence purposes.) This Court concludes that Palmer is charged with a serious offense.

The risk of violence in the subject case is demonstrated by the facts and circumstances surrounding Palmer's arrest. The charge in this case carries a maximum sentence of ten years incarceration. The defense argues that the government interest is lessened because the Sentencing Guidelines

call for a sentence ranging from 15 to 21 months. At the time of briefing (May 23, 2006), the defendant had been confined approximately 14 months and at the time of this report, 16 months. Moreover, if involuntary medication is ordered, the defense argues that the defendant could be confined for at least 4 months for medication and there is a possibility of an additional 4 months if the medication is changed. (See Dr. Lucking's testimony, t. 60-61 & 79.) The defense argues in effect that the defendant could be confined a total of 24 months pretrial, which would equal or exceed a sentence under the Sentencing Guidelines. Thus, the defense argues that Palmer could serve more than his maximum sentence prior to commencement of trial after institution of medicine.

The government argues that the Sentencing Guideline range, especially post-**United States v. Booker**, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (the Supreme Court held that the Federal Sentencing Guidelines are advisory, not mandatory) gives only an idea of what the sentence may be. Given the defendant's history of threatening and dangerous behavior, a district court could impose a lengthy sentence and could also impose a term of supervised release if the defendant is prosecuted and convicted as charged. Therefore, the importance of the need of prosecution of the defendant Palmer justifies the involuntary medication of Palmer to restore his competence. Review of the testimony and exhibits shows that the

defendant's prior behavior (threat to kill a federal court security officer and his second arrest near a conference attended by federal judges while the defendant was armed,) strongly suggests that he poses a threat to federal employees of the court (MDLA). The government's interst in bringing the defendant to trial is not diminished.

The possibility of a civil commitment does not diminish the government's interest in bringing the defendant to trial. [See Dr. Lucking's report of October 15, 2004, (Exhibit 2) where the staff at Butner did not find the defendant to be a candidate for civil commitment.] There was nothing presented at the evidentiary hearing which indicated that a civil commitment would be appropriate. The government's interest in obtaining a criminal conviction is not diminished.

2. Whether Involuntary Medication Will Significantly Further the Government's Interests?

The second criterion of the **Sell** analysis requires the court to conclude that "involuntary medication will significantly further" the government's interests. 539 U.S. at 181, 123 S.Ct. 2184. In arriving at the above conclusion, the Court must find that the administration of the medication is both "substantially likely to render the defendant competent to stand trial," and is "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to

assist counsel in conducting a trial defense." **Id.**

The Facts section of this Report, pages 6 through 10, which is a summary of the medical testimony of Dr. Robert George Lucking and Dr. John W. Thompson, Jr., is hereby incorporated in this section as though fully printed herein. The following is a more detailed review of the doctors' testimony.

Drs. Lucking and Thompson testified that the administration of antipsychotic medication would render the defendant competent to stand trial. (T. 47-48, 96.) Drs. Lucking and Thompson agreed that the antipsychotic medication was substantially unlikely to have side effects which would affect the trial demeanor. (T. 56, 96.)

Drs. Lucking and Thompson opinions differed on which antipsychotic medication was best indicated for the defendant based on the type of side effects typically experienced by a schizophrenic patient. Their difference of opinion regarding a proposed treatment regime does not affect the ultimate conclusion that the defendant should be administered antipsychotic medication.

In his 2005 evaluation, Dr. Lucking set forth the two types of antipsychotic medication available for a schizophrenic patient. The first generation antipsychotic medications, which include haldol decanoate (haldol), have side effects which include parkinsonism (stiffness and difficulty walking), akathisia (restlessness), and dystonic symptoms. (T. 51-56.) These side effects occur to varying degrees

in approximately 30% of the patients treated. (Exhibit 3, p. 9.) These symptoms can generally be successfully treated with other medications. (T. 51-53; 74-76.) The medications used to treat the side effects do not generally have side effects which will impair a patient's competency to stand trial. (T. 74.) One group of side effects of the first generation antipsychotic medications include tardive syndromes, which are usually the result of long-term use. (T. 53-56.) Tardive akathisia is usually successfully treated. (Exhibit 3, p. 10.)[8] There is not much treatment for tardive dyskinesia, which can result in permanent conditions, and thus the patient must be monitored for any sign of these symptoms. (T. 70-71, 76.) If a patient appears to be developing any of these symptoms, then his medication regime can be changed to a second generation antipsychotic medication, which does not include these side effects. (T. 76.) The rarest and most serious potential side effects of the first generation antipsychotic medication are sudden death and neuroleptic malignant syndrome. (T. 55.) Dr. Lucking testified that these two side effects occur very rarely and that he himself had never seen such a case. (T. 55.)

Of the first generation antipsychotic medications, haldol and fluphenazine (prolixin) are available in injectable form that could be used to treat the defendant.

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[8] There is a five percent annual incidence of tardive diskinesia (5% after one year; 10% after two years, and 15% after three years). (T. 55-56.)

The second generation antipsychotic medications generally have different side effects, mainly metabolic ones. (T. 57.) These side effects include weight gain or obesity, insulin resistance, high blood pressure, and serum lipid abnormalities. (T. 58; Exhibit 3, p. 13.) These side effects can usually be monitored and treated. There are some tardive syndromes associated with the second generation medications, but the incidence is much lower than with the first generation medications. (Exhibit 3, p. 12.) These side effects can be monitored and treated. (T. 59.) Because the metabolic side effects require blood testing for monitoring, a defendant who refused treatment would be subject to both the involuntary injection of the medication and the periodic drawing of blood to monitor his condition. (T. 62.)

Dr. Lucking would most likely opt for haldol, based on its efficacy in treating the symptoms of schizophrenia; the ease of treatment of its side effects; and the non-intrusive nature of the monitoring of symptoms. (i.e., no need for involuntary periodic blood withdrawal). (T. 59-60.) Dr. Thompson said that the monitoring of the metabolic side effects of risperidone consta can easily be done in an institutional or penal setting. (T. 88-89.) Moreover, Dr. Thompson said that both the first and second generation antipsychotic medications were substantially unlikely to render the defendant competent to stand trial and substantially unlikely to have side effects that would render him incompetent. (T. 96.) Further, Dr. Thompson

stated that, up until two years ago, when risperidone was finally made available in an injectable form, the only treatments available for the involuntary treatment of schizophrenic patients were the first generation antipsychotic medications. (T. 98-99.) Dr. Thompson still considers the first generation medications valid treatments when the circumstances so require or when the second generation medication is not effective in treating the patient. (T. 100, 105.)

In conclusion, both Drs. Lucking and Thompson agreed that both the first generation and the second generation antipsychotic medications are appropriate treatments for the defendant. They also agreed that the side effects generated by both generations of medications are maneageable and, unlikely to affect the outcome of a trial. Thus, this prong of the **Sell** analysis is met. Therefore, the court concludes that the involuntary administration of antipsychotic medication to the defendant will further the government's interests.

3. Whether Involuntary Medication is Necessary to Further the Government's Interests?

The third criterion of the **Sell** analysis requires the court to conclude that involuntary medication is necessary to further the government's interests by finding "that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." **Sell**, 539 U.S. at 181, 123 S.Ct. 2185.

Based upon the recent diagnosis of the defendant as schizophrenia undifferentiated type, Dr. Lucking and the medical team at Butner recommended treatment of the defendant with antipsychotic medication. (T. 47.) Dr. Lucking testified that the only treatment option available for a schizophrenic patient such as the defendant to render him competent to stand trial is antipsychotic medication. (T. 48-50; also see Exhibit 3, p. 7.) the defendant will not voluntarily receive the medication as evident by the testimony of Dr. Weaver and Dr. Lucking. (T. 34-35; 63.) Dr. Lucking expressed his opinion as follows in pertinent part:

> Q Have you, in fact, have you or someone as part of your treatment team, sought permission or sought to persuade or talked to the defendant about possible voluntary medication?
>
> A We have. Both Dr. Walden Weaver and I have talked to Mr. Palmer and recommended that he take the medication and advised him that it would be the best course for him to take the voluntary medication, or we would have to seek an Order for involuntary medication. We have done that on several occasions.

> Q And he has refused each time?
>
> A He has refused each time.

(T. 63.)

When Dr. Lucking was asked as to whether there were any other less intrusive treatments available for the defendant which would render him competent to stand trial, Dr. Lucking stated, "As I outlined in the report, other psychotherapy, education, cognizance therapy will not work to restore [the defendant's] competency"...and that" without medication, the defendant's prognosis is "very, very dim." (T. 49.) [sic]

The medical team at Butner opined that involuntary medication is necessary to restore Mr. Palmer's competency to stand trial. (Exhibit 3, p. 7.) The medical team addressed the less intrusive treatments regarding the defendant as follows:

> Alternative, less intrusive treatments which are available are unlikely to be effective in achieving the same results. First, Mr. Palmer does not have any insight/understanding that he has a mental illness. He, therefore, does not believe he is in need of treatment of any type. He is unlikely to engage in any form of psychotherapy (cognitive-behavioral, group, behavioral, interpersonal). Furthermore, while there is evidence in the psychiatric literature that some

> forms of psychotherapy are beneficial to an individual with psychotic symptoms, this is as an adjunctive treatment to the antipsychotic agents to improve such things as insight, compliance, or coping skills. There is no evidence that psychotherapeutic techniques alone are effective alternatives for antipsychotic agents.

(Exhibit 3, p.7.)

Considering the medical testimony and report, this Court finds that involuntary medication of the defendant is necessary to further the government's interests because the evidence established that less alternative treatments are unlikely to achieve substantially the same results.

4. Whether the Administration of Antipsychotic Medication is Medically Appropriate?

The fourth criterion of the **Sell** analysis requires the court to "conclude that the administration of the drugs is medically appropriate, i.e., in the patient's best medical interests in light of his medical condition." 539 U.S. at 181, 123 S.Ct. 2185.

The defense concedes that the administration of antipsychotic medication is an appropriate treatment from a medical standpoint. (See Record Doc. No. 57, page 4, Memorandum on Behalf of Defendant Wayne Lee Palmer.)

As previously mentioned, Dr. Lucking and Dr. Thompson said that the treatment of the defendant with antipsychotic medication is medically appropriate to render the defendant competent to stand trial. (See pages 8-9- of this Report.) The defendant's prognosis for improvement without treatment with antipsychotic medication is very very dim. [sic] People with schizophrenia have chronic symptoms and they just don't get better. (T. 48-49.) If the defendant is treated he will most likely have a decrease in delusional beliefs and auditory hallucinations, a decrease in cognitive disorganization and restoration of more normal thought process thereby improving the level of communication between the client and his attorney. (Exhibit 3, p.6.) The court concludes that involuntary administration of antipsychotic medication to the defendant is medically appropriate and is in the defendant's best medical interest in light of his medical condition.

Recommendation

After considering the record, the applicable law and Wayne Lee Palmer's current lack of competence to stand trial, it is hereby recommended that the district court order Palmer committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d)(2)(A) and Grant the Government's motion to have Palmer medicated involuntarily to render him

competent to stand trial. The Attorney General shall hospitalize Palmer for medical treatment including involuntary administration of antipsychotic medication at a suitable facility for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability in the foreseeable future that Palmer will attain the capacity (competency) to permit the trial to proceed. The Attorney General shall prepare a report and submit same to the court pursuant to Title 18, United State Code, Section 4247(b) and (c).

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. **Douglass v. United Service Auto Ass'n**, 79 F. 3d 1415, 1430 (5th Cir. 1996).

Baton Rouge, Louisianaa, this 28th day of July, 2006.

s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO. 05-121
SECTION "LMA" (LM)

DISTRICT JUDGE LANCE AFRICK
MAGISTRATE JUDGE LOUIS MOORE, JR.

__Fee_____
__Process_____
X Dktd_____
__CtRmDep_____
__Doc. No_____

ORDER AND REASONS

The Court, having considered the Government's motion for an Order for involuntary medication to restore Wayne Lee Palmer's competency to stand trial, the memoranda of the defendant and the government, the applicable law and the Report and Recommendation of the U.S. Magistrate Judge, the filed objections t the Report and Recommendation and the Government's response, hereby approves the Report and

Recommendation of the U.S. Magistrate Judge and adopts it as its opinion in this matter.

In arriving at its conclusion, the Court has adopted the standards of proof, i.e. proof by clear and convincing evidence, set forth in *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004). *See also United States v. Evans*, No. 06-4480, 2006 U.S. App. LEXIS 23263, at *2 (4th Cir. Sept. 12, 2006); *United States v. Bradley*, 417 F.3d 1107, 1114 (10th Cir. 2005); *United States v. Algere*, 396 F. Supp. 2d 734, 746 (E.D. La. 2005) (Vance, J.) (applying same standard).

Accordingly,

IT IS ORDERED that the United States' motion for an Order for involuntary medication to restore competency of Wayne Lee Palmer is **GRANTED.**

IT IS FURTHER ORDERED that Wayne Lee Palmer is committed to the custody of the Attorney General of the United States pursuant to Title 18, United States Code, Section 4241(d)(2)(A). The Attorney General shall hospitalize Palmer for medical treatment including involuntary administration of antipsychotic medication at a suitable facility for a reasonable period of time, not to exceed four months, as is necessary to restore Palmer to competency to permit the trial to proceed. Medical personnel **must** provide Palmer with a copy of this Order and Reasons, and explain to him the potential side effects of the medication. All medical personnel treating Palmer shall request that Palmer voluntarily take the medication before each and every

involuntary administration of medication. If Palmer does not agree to take the medication voluntarily within ten days of the date of this Order, medical personnel are authorized to administer the medication over Palmer's objection.

IT IS FURTHER ORDERED that if, upon reaching the close of the four month period, Palmer has not been restored to competency, but there is a substantial probability that he can be restored to competency if treatment is continued, the Government may file a motion for this Court to extend Palmer's commitment and treatment.

IT IS FURTHER ORDERED that, at the end of four months, or when Palmer's competency is restored if that occurs in less than four months, a report shall be filed by the Attorney General with the Court detailing the results of the treatment. The report must set forth the criteria that are used to determine whether Palmer has been restored to competence to stand trial and the result of the application of those criteria to Palmer's case. If the doctors conclude that Palmer has been restored to competence to stand trial, they must also set forth what side effects, if any, Palmer experienced on the medication and how the medication will, if at all, affect Palmer at trial.

IT IS FURTHER ORDERED that a conference shall be held by the U.S. Magistrate Judge on or before January 19,

2007, so that defendant's status can be reviewed.

New Orleans, Louisiana, September 20, 2006.

s/ Lance M. Africk

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA
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SIGN S/ DEPUTY CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
WAYNE LEE PALMER

CRIMINAL ACTION
NO. 05-121-D

NOTICE OF APPEAL

NOW COMES THE DEFENDANT, Wayne Lee Palmer, who gives notice of his appeal to the United States Fifth Circuit Court of Appeals from the District Court's ruling rendered on September 20, 2006 granting the United States' motion for an order for involuntary medication to restore the defendant to competency to stand trial.

BY ATTORNEY:
S/ RICHARD M. UPTON
RICHARD M. UPTON

ATTORNEY AT LAW
436 Government Street
Baton Rouge, Louisiana 70802
Telephone: (504) 344-1704
Bar Roll No.: 12984

Additional Notices Sent to:
USCA
TRF mailed to R. Upton

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon counsel for all parties to this proceeding by mailing the same to each by First Class United States mail, properly addressed and postage prepaid on this 22 day of September, 2006.

s/ Richard M. Upton
RICHARD M. UPTON

Additional Notices Sent to:
USCA
TRF mailed to R. Upton

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2007
Charles R. Fulbruge III
Clerk

No. 06-31018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WAYNE LEE PALMER,
Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana

Before GARWOOD, JOLLY and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This interlocutory appeal involves the district court's grant of the Government's motion to involuntarily medicate Wayne Lee Palmer to render him competent to stand trial. Because we conclude that this motion is constitutionally permissible under the

particular circumstances shown in this record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Palmer has had a long history of involvement with federal authorities. In October 2003, he entered the Clerk of Court's office for the Middle District of Louisiana, demanding to know why the pro se lawsuit he had previously filed had been dismissed. He became irrate [sic], and court security was called. As Palmer was leaving the building, he threatened to kill a court security officer ("CSO") who had attempted to retrieve his visitor's badge. Federal authorities, including FBI Agent McNulty, were subsequently sent to Palmer's house to arrest him. Though Palmer initially resisted, he was eventually subdued and arrested; he had a semi-automatic handgun in his back pocket.

On October 29, 2003, Palmer was indicted on one count of threatening to murder a federal official, in violation of 18 U.S.C. §115(a)(1)(B). He was found to be incompetent to stand trial, and committed to Butner Federal Medical Center ("Butner FMC") for a mental health evaluation. Dr. Angela Walden-Weaver, a clinical psychologist, and Dr. Robert Lucking, a psychiatrist, issued a report of their evaluation in August 2004, concluding that Palmer was suffering from a delusional disorder. Palmer was then referred for an evaluation to determine whether he was eligible for civil commitment under 18 U.S.C. §4246. During that evaluation, he stated that

he had no interest in acquiring another weapon, and based on that statement, as well as community support and his lack of a violent history, the clinicians found that Palmer's release would not create a substantial risk of bodily injury to another person or serious damage to the property of others. The indictment against Palmer was dismissed on November 19, 2004.

Less than a month later, Palmer bought a gun at a pawn shop in Baton Rouge. On the form accompanying the purchase, he falsely answered "no" to the question of whether he had ever been adjudicated mentally incompetent or committed to a mental institution.

On May 12, 2005, U.S. marshals, when securing the campus of Louisiana State University Law School for a Federal Bar Association seminar scheduled to be held there, found Palmer sitting in the driver's seat of a vehicle in the parking lot. When the marshals approached the vehicle and requested to speak with him, Palmer stated: "I know who you are and I am calling the police." The marshals observed a gun on the front passenger seat, and drew their weapons and ordered Palmer out of the car. He disobeyed, and instead began driving away. The marshals pursued him, and he was apprehended. After they placed him under arrest, the marshals searched his vehicle, finding a firearm as well as a box of pistol ammunition and a loaded pistol magazine.

On May 26, 2005, Palmer was indicted on one count of possession of a firearm by a person adjudicated mentally defective, in violation of 18 U.S.C. §922(a)(6), and one count of possession of a firearm and ammunition by a person that has been adjudicated as mentally defective and committed to a mental institution, in violation of 18 U.S.C. §922(g)(4). Palmer's appointed counsel filed a motion to determine competency and notice of intent to use the insanity defense. The district court appointed Dr. John Thompson, Jr., Chief of Staff of the Eastern Louisiana Mental Health System and Vice Chair of Adult Psychiatry and Director of Forensic Neuropsychiatry at Tulane University, to examine Palmer and file a report with the court.

In his report, Dr. Thompson found that Palmer was incompetent to stand trial because he did not have a complete awareness of the charges against him, nor did he appreciate the seriousness of the charges. Dr. Thompson diagnosed Palmer with a form of schizophrenia. His report concluded that Palmer presented a danger to the public, and recommended that he be returned to Butner FMC with an order for forced medication. On August 18, 2005, the district court remanded Palmer to the custody of the Attorney General for an evaluation of his competency to stand trial.

Palmer was returned to Butner FMC, and once again evaluated by Dr. Walden-Weaver and Dr. Lucking, who also diagnosed him with a form of schizophrenia. In their

report, the doctor recommended involuntary medication to render him competent to stand trial. Thereafter, Palmer filed a motion for a competency hearing, while the Government filed a motion to involuntarily medicate Palmer to restore his competency for trial.

The magistrate judge conducted a competency hearing on February 2, 2006. The parties jointly introduced the reports from Palmer's previous evaluations, and stipulated that the sentencing guidelines range for the charged offenses was from fifteen to twenty-one months. Dr. Lucking testified for the Government, recommending that Palmer receive Haldol injections to restore competency. While he acknowledged that there were newer anit-psychotic drugs with less serious side effects available, Dr. Lucking testified that he preferred Haldol because of its overall efficacy. Dr. Thompson testified on behalf of Palmer. He also recommended involuntary medication, but preferred the use of a second-generation anti-psychotic drug, although he agreed that both Haldol and the newer medications would be sufficiently safe and effective. Agent McNulty testified about the charges brought against Palmer in 2003.

The magistrate judge issued a thorough and detailed report and recommendation where he found Palmer incompetent to stand trial and recommend involuntary medication to restore his competency. The district court adopted the magistrate judge's recommendation and, over Palmer's objection, granted the motion. Palmer now appeals.

II. DISCUSSION

Even though the United States Supreme Court has recognized that inmates have an "important, constitutionally protected liberty interest in avoiding unwanted administration of antipsychotic drugs," it has held that involuntary medication doe not violate the due process clause if the inmate is a danger to himself or others and treatment is in the inmate's medical interest. Washington v. Harper, 494 U.S. 210, 221, 226 (1990). In Sell v. United States, the Court explained that the involuntary medication of a defendant solely to render him competent to stand trial for a serious, but nonviolent, crime is permissible in rare circumstances, "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. 166, 179 (2003). The Court declared that lower courts, when making such a determination must consider four factors: (1) whether important governmental interests are at stake; (2) whether involuntary medication will significantly further those interests; (3) whether involuntary medication is necessary to further those interests; and (4) whether the administration of the drugs is medically appropriate. Id.

Palmer does not contest the district court's finding that the administration of

drugs is medically appropriate.[1] Thus, the issue before this court is whether the district court properly assessed the other three Sell factors: (1) that important governmental interests are at stake; (2) that involuntary medication will further the government's interest; and (3) that forced medication is necessary to further the government's interest. We have not had a prior opportunity to consider the government's interest. We have not had a prior opportunity to consider the appropriate standard of review for Sell cases. However, the Second Circuit has determined that whether the government's asserted interests are sufficiently important is a legal issue subject to de novo review, while the other Sell factors involve factual findings which are reviewed for clear error. United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004). We formally adopt the standard set forth in Gomes, and apply it in this case.

In Sell, the Court recognized that there is an important governmental interest in ensuring that individuals accused of serious crimes are brought to trial. 539 U.S. at 180. In this case, the Government argues that the offense for which Palmer was charged is serious, as he faces a maximum sentence of ten years and his behavior created a substantial risk of harm to himself and others. Palmer contends that because his United States sentencing guidelines range is only fifteen to twenty-one months, the Government

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[1] He does not argue that in the event he is involuntarily medicated, the newer drugs, rather than Haldol, should be used.

is characterizing his crime more seriously than it actually was. While that may be, Palmer's argument still fails. Not only have courts held that crimes authorizing punishments of over six months are "serious," they have also concluded that it is appropriate to consider the maximum penalty, rather than the sentencing guidelines range, in determining "seriousness" in involuntary medication proceedings. See United States v. Evans, 404 F.3d 227, 237-38 (4th Cir. 2005); United States v. Algere, 396 F. Supp. 2d 734, 739 (E.D. La. 2005). Furthermore, given the fact that Palmer threatened the life of a federal officer and caused substantial disruption on and near the LSU campus, it is possible a court may find it appropriate, if he is convicted, to upwardly depart from the guidelines recommended sentencing range. Thus, we cannot conclude that the district court erred by finding that important governmental interests are at stake.

Neither do we conclude that the district court clearly erred by finding that Palmer's involuntary medication will significantly further the government's interest. In Sell, the court explained that this factor requires that the trial court to determine that the administration of the drugs is substantially likely to both render the defendant competent to stand trial as well as substantially unlikely to have side effects that would significantly interfere with the defendant's ability to assist his counsel. 539 U.S. at 181. Palmer argues that the lower court attached too little significance to the dangerous side effects accompanying the administration of anit-

psychotic drugs, particularly Haldol. Dr. Lucking testified that there is a one-in-three chance that Palmer could develop extrapyramidal symptoms, such as tardive dyskinesia (involuntary movements) and akathisia (restlessness), if he is forced to take Haldol. While the newer drugs do not have as many neurological side effects, there are other, mainly metabolic, side effects associated with those as well. Yet, all the doctors who testified at the hearing agree that no matter which drug is used, in the vast majority of cases the side effects can be treated or minimized. Palmer's argument fails because while he has demonstrated that the side effects will be unpleasant, he has not shown how his ability to assist in his defense will be substantially undermined by the medication.

Finally, we turn to the last factor: whether forced medication is necessary to further the government's interest. The Supreme Court has instructed that courts must only involuntarily medicate a defendant if "alternative, less intrusive treatments are unlikely to achieve substantially the same result." Id. It is undisputed that other treatment options, such as psychotherapy or education would be ineffective in restoring Palmer's competency. However, Palmer asserts that before resortin to involuntary medication, he should be reevaluated for civi commitment. He also argues that if he is made competent it is probable that the will be found not guilty by reason of insanity, and even if he is convicted, given that he has not been confined since May 2005, he will likely have

already served his sentence. While there is some force to Palmer's contentions, we cannot concluded that the district court's determination was clearly erroneous. Palmer was considered for civil commitment in 2004 and found not to be a suitable candidate at that time. It is possible that a similar outcome will result if he is evaluated again. Additionally, despite the fact that Palmer may serve very little, and possibly no, prison time even if he is tried, the governmental interest, as the court explained in Sell, is not in seeing him convicted, but rather in ensuring that he is brought to trial. Id. at 180 ("Power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace" (quoting Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J. concurring))). Because Palmer can only be brought to trial if he is competent, involuntarily medication is necessary under the circumstances of this case.

III. CONCLUSION

Because we find that the record in this case supports the need to involuntarily medicate Palmer in order to render him competent to stand trial, we AFFIRM the district court's judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-31018

U.S. COURT OF APPEALS
FILED
NOV 27 2007
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WAYNE LEE PALMER
Defendant-Appellant

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion 10/31/07, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, JOLLY, and STEWART, Circuit Judges

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Reahearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Ban is DENIED.

ENTERED FOR THE COURT:
S/ CARL E. STEWART
United States Circuit Judge

REHG-6a

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

No. 07-1265

In the Supreme Court of the United States

WAYNE LEE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether courts may consider an incompetent defendant's statutory maximum sentence when determining whether the defendant faces "serious criminal charges," *Sell* v. *United States*, 539 U.S. 166, 179 (2003), that would warrant involuntary medication to restore competence.

2. Whether petitioner's charged offenses—making a false statement in connection with the acquisition of a firearm, and illegally possessing a firearm—were "serious."

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In the Supreme Court of the United States

No. 07-1265

WAYNE LEE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 40-49) is reported at 507 F.3d 300.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2007. A petition for rehearing was denied on November 27, 2007 (Pet. App. 50-51). The petition for a writ of certiorari was filed on February 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Middle District of Louisiana on one count of making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6),

and one count of possessing a firearm and ammunition as a person who has been adjudicated as a mental defective or who has been committed to a mental institution, in violation of 18 U.S.C. 922(g)(4). Pet. App. 2-4. The district court granted the government's motion to involuntarily medicate petitioner to restore his competency to stand trial. The court of appeals affirmed. *Id.* at 40-49.

1. On October 16, 2003, petitioner entered the Clerk's office at the Middle District of Louisiana in Baton Rouge and demanded to know why a pro se lawsuit he had filed had been dismissed. Petitioner became irate, and court security was called to intervene. As he left the building, petitioner pointed at a Court Security Officer and said, "I am going to kill you. Do you hear me? I am going to kill you." When federal authorities went to petitioner's home to arrest him, he resisted arrest and had to be subdued; a handgun was found in his pocket. Pet. App. 41; Gov't C.A. Br. 4-5.

Petitioner was indicted on one count of threatening to murder a federal official, in violation of 18 U.S.C. 115(a)(1)(B). He was subsequently deemed incompetent to stand trial and was referred to Butner Federal Medical Center (FMC) in Butner, North Carolina, for a mental-health evaluation. Dr. Angela Walden-Weaver and Dr. Robert Lucking examined petitioner and concluded that he suffered from a delusional disorder. Petitioner was then referred for an evaluation to determine whether he was eligible for civil commitment under 18 U.S.C. 4246. During that evaluation, petitioner stated that he had no interest in acquiring another weapon. Based in part on that statement, the clinicians found that petitioner's release would not create a substantial risk of bodily injury to another person or serious dam-

age to the property of others. On November 19, 2004, the indictment against petitioner was dismissed. Pet. App. 41-42; Gov't C.A. Br. 5-7.

Less than a month later, petitioner bought a firearm from a pawn shop. On the form accompanying the purchase, he falsely answered "no" to the question whether he had ever been adjudicated mentally incompetent or committed to a mental institution. Pet. App. 42; Gov't C.A. Br. 7.

On May 12, 2005, the Louisiana State University Law School in Baton Rouge was hosting a Federal Bar Association seminar. Many federal judges from the Middle District of Louisiana and neighboring districts were expected to attend, and United States Marshals were assigned to provide security for the judges. While securing the school's parking lot, the marshals found petitioner sitting in the driver's seat of a vehicle. The marshals observed a gun on the front passenger seat, and they drew their weapons and ordered petitioner out of the car. Instead of complying, petitioner began driving away, and the marshals pursued and apprehended him. After they placed him under arrest, the marshals searched petitioner's vehicle, finding a firearm, a box of ammunition, and a loaded magazine. Pet. App. 42; Gov't C.A. Br. 7-9.

2. a. A grand jury in the United States District Court for the Middle District of Louisiana charged petitioner with making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6), and possessing a firearm and ammunition as a person who has been adjudicated as a mental defective or who has been committed to a mental institution, in violation of 18 U.S.C. 922(g)(4). Pet. App. 2-5.

b. Petitioner filed a motion to determine competency, and the district court appointed Dr. John Thompson, Jr., to examine him. Dr. Thompson diagnosed petitioner with a form of schizophrenia and determined that petitioner was incompetent to stand trial because he did not have a complete awareness of the charges against him and did not appreciate their seriousness. The district court then remanded petitioner to the custody of the Attorney General for an evaluation at Butler FMC. Petitioner was once again examined by Drs. Walden-Weaver and Lucking, who also diagnosed him with a form of schizophrenia and recommended involuntary medication to render him competent to stand trial. Pet. App. 43-44; Gov't C.A. Br. 9-11.

The government moved to involuntarily medicate petitioner to restore his competency for trial. At a hearing before a magistrate judge, the parties jointly introduced the reports from petitioner's previous evaluations and stipulated that the Sentencing Guidelines range for the charged offenses was 15 to 21 months. Dr. Lucking testified for the government, recommending that petitioner receive Haldol, an anti-psychotic drug, to restore his competency. Dr. Thompson testified on behalf of petitioner, but he also recommended involuntary medication. Although he preferred the use of a newer anti-psychotic drug, he agreed that both Haldol and the newer drug would be safe and effective. Pet. App. 44; Gov't C.A. Br. 11-14.

The magistrate judge found petitioner incompetent to stand trial and recommended involuntary medication to restore his competency. Pet. App. 6-32. Applying the factors set out in *Sell* v. *United States*, 539 U.S. 166 (2003), the magistrate judge concluded that important governmental interests were at stake because petitioner

was charged with a serious offense; involuntary medication would significantly further the government's interests because the medication was substantially likely to render petitioner competent to stand trial and was substantially unlikely to have side effects that would interfere with his ability to assist counsel in conducting a trial defense; involuntary medication was necessary to further the government's interests because alternative, less-intrusive treatments were unlikely to achieve substantially the same results; and administration of medication was medically appropriate. Pet. App. 19-31. The district court adopted the magistrate judge's recommendation and ordered that petitioner be medicated. *Id.* at 33-36.

3. The court of appeals affirmed. Pet. App. 40-49. The court noted that this Court's decision in *Sell* establishes the factors that a court must consider before authorizing involuntary medication of a defendant to render him competent to stand trial. *Id.* at 45. In *Sell*, the Court held that involuntary medication of an incompetent defendant "facing serious criminal charges" is permissible "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179.

The court of appeals determined that all of the *Sell* factors were present in this case. The court noted that petitioner did not contest that the administration of drugs would be medically appropriate. Pet. App. 45-46. The court also concluded that important governmental interests were at stake because petitioner was charged with a serious offense. The court observed that peti-

tioner's Sentencing Guidelines range was 15 to 21 months; that the maximum sentence for petitioner's offenses was ten years of imprisonment; and that, because petitioner had previously threatened the life of a federal officer, a court might find it appropriate, if petitioner were convicted, to impose a sentence exceeding the Guidelines range. *Id.* at 47.

The court of appeals also held that the district court did not clearly err in finding that petitioner's involuntary medication would significantly further the government's interest. Pet. App. 47. The court noted that it was undisputed that other treatment options, such as psychotherapy or education, would be ineffective in restoring petitioner's competency. *Id.* at 48. And it explained that medication would not substantially undermine petitioner's ability to assist in his defense, since "all the doctors who testified at the hearing agree that no matter which drug is used, in the vast majority of cases the side effects can be treated or minimized." *Ibid.*

ARGUMENT

In *Sell* v. *United States*, 539 U.S. 166, 179 (2003), the Court held that the involuntary medication of an incompetent defendant facing "serious criminal charges" may be warranted to restore his competence to stand trial. According to petitioner (Pet. 6-13), lower courts disagree on whether the seriousness of criminal charges should be assessed based on a defendant's likely sentence under the Sentencing Guidelines or on the statutory maximum sentence. Petitioner also asserts (Pet. 14-16) that the district court and the court of appeals erred in concluding that his charges were "serious." Petitioner is incorrect on both points. The case-specific

determination that petitioner faces serious criminal charges does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioner claims (Pet. 7) that "[s]ome confusion seems to have developed among the District and Circuit Courts over the exact meaning of 'serious' in *Sell*." Petitioner cites (Pet. 9-10) *United States* v. *Evans*, 404 F.3d 227, 237 (2005), in which the Fourth Circuit held that "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes," and *United States* v. *Hernandez-Vasquez*, 513 F.3d 908, 919 (2008), in which the Ninth Circuit "disagree[d] with the Fourth Circuit" and held that "the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness." Petitioner misreads those cases. In fact, *Evans* and *Hernandez-Vasquez* are consistent with each other and with the decision below.

In *Evans*, the court stated that the "focus" should be on the statutory maximum sentence, 404 F.3d at 237, and it rejected the claim that courts "should determine seriousness *solely* by examining" a defendant's probable Sentencing Guidelines range, *id.* at 238 n.7 (emphasis added). In so holding, the court noted that sole reliance on the probable Guidelines range would be "unworkable," "because at this stage in the proceedings, there is no way of accurately predicting what that range will be." *Id.* at 238. The court did not foreclose consideration of the defendant's probable Guidelines range as a factor where, as here, the parties have stipulated to the applicable range.

In *Hernandez-Vasquez*, the court held (in rejection of what it perceived to be the position of the Fourth Cir-

cuit in *Evans*) that the likely Sentencing Guidelines range is the appropriate "starting point" for the analysis of a crime's seriousness. 513 F.3d at 919. The court emphasized that "[i]t is not, however, the only factor that should be considered." *Ibid.* Rather, the court noted that "[b]ecause the sentencing guidelines do not reflect the full universe of relevant circumstances, two indictments alleging crimes with equal likely guideline ranges will not always be equally serious within the meaning of *Sell*." *Ibid.* Thus, the court at least left open that the statutory maximum sentence may also be relevant.

The decision below is consistent with both *Evans* and *Hernandez-Vasquez* because it treated the Sentencing Guidelines range as a "starting point," *Hernandez-Vasquez*, 513 F.3d at 919, but did not "determine seriousness solely by examining [the] probable guidelines range." *Evans*, 404 F.3d at 238 n.7. Instead, the court of appeals examined not only petitioner's likely Guidelines range but also the applicable statutory maximum sentence and other factors—including the circumstances of petitioner's offenses—before concluding that petitioner's charged offenses were serious. Pet. App. 46-47.

The decision of the court of appeals represents a correct application of *Sell*, which calls on courts to "consider the facts of the individual case in evaluating the Government's interest in prosecution." 539 U.S. at 180. It is also consistent with the decisions of other courts of appeals, which have considered both the applicable statutory maximum or minimum and the probable Sentencing Guidelines range in determining whether an offense is "serious" under *Sell*. See, *e.g.*, *United States* v. *Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007) (reasoning that "[w]hether a crime is 'serious' re-

lates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he was charged," and stating, "[w]e consider a maximum sentence of twenty years and a likely guideline sentence of six to eight years sufficient to render the underlying crime 'serious.'"); *United States* v. *Gomes*, 387 F.3d 157, 160 (2d Cir. 2004) (describing "the seriousness of the crime and [the defendant's] perceived dangerousness to society [as] evident from the substantial sentence [the defendant] faces if convicted" and noting that the defendant "faces a possible statutory minimum of fifteen years' imprisonment") (citation omitted), cert. denied, 543 U.S. 1128 (2005). Contrary to petitioner's contention, the lower courts do not apply disparate standards in determining seriousness under *Sell*, but rather follow *Sell*'s directive to look at all the circumstances of "the individual case." 539 U.S. at 180. Those circumstances include not only the likely Guidelines range for the defendant's offense but also any applicable statutory maximum or minimum sentence.

b. Petitioner asserts (Pet. 12-13) that seriousness should be judged based on the defendant's likely sentence under the Sentencing Guidelines, with no consideration of the statutory maximum sentence for the defendant's offense. But *Sell*, which directs courts to consider "the facts of the individual case," 539 U.S. at 180, calls for courts to consider *all* relevant factors. Accordingly, there is no need for this Court to establish a "uniform standard for measuring the 'seriousness' of a crime under *Sell*" (Pet. 12), let alone a standard that requires courts to focus on only one factor. Indeed, because the Guidelines are now advisory, see *Irizarry* v. *United States*, No. 06-7517 (June 12, 2008), slip op.; *Gall* v.

United States, 128 S. Ct. 586 (2007); *United States* v. *Booker*, 543 U.S. 220, 245 (2005), an exclusive focus on the Guidelines range would be particularly inappropriate. In any event, this case is a poor vehicle for considering whether to adopt a rule requiring sole consideration of the likely Guidelines sentence, since, as discussed below, it is far from clear that petitioner could prevail even under such a rule.

2. Petitioner argues (Pet. 14-16) that, "taking into account all of the circumstances" of his case and considering his "likely" sentence under the Sentencing Guidelines, the district court and court of appeals erred in finding that the offenses with which he has been charged are "serious" under *Sell*. Petitioner is incorrect, and further review of that case-specific issue is unwarranted.

Petitioner has been charged with making a false statement in connection with the purchase of a firearm and with illegally possessing a firearm. Each of those offenses carries a statutory maximum sentence of ten years. See 18 U.S.C. 924(a)(2). The conduct that led to petitioner's arrest—possession of a gun on a university campus where a judicial conference was being held, and fleeing from federal officers in his vehicle—created a substantial risk of harm to others. That conduct can appropriately be described as "serious," especially when viewed in light of petitioner's previous arrest for threatening to murder a federal official at a courthouse.

The seriousness of petitioner's offenses is in no way undermined by consideration of his likely Guidelines sentence. Even assuming that petitioner's Guidelines range of 15 to 21 months can be considered low, the range is low because petitioner does not have a criminal history—and petitioner lacks a criminal history only because he avoided federal prosecution in the past by

reason of his incompetence to stand trial. Based on the circumstances surrounding petitioner's offenses, as well as his history of threatening behavior, a sentencing court might reasonably impose a sentence exceeding the Guidelines range. See Pet. App. 47.

Petitioner argues (Pet. 15) that he has already been incarcerated for a period greater than the top of his probable Sentencing Guidelines range. From this he infers that the government does not have important interests at stake in prosecuting him. But as the court of appeals noted, the government's interest is not in having petitioner serve prison time, but in ensuring that he is brought to trial. Pet. App. 49; see *Sell*, 539 U.S. at 180 ("The Government's interest in *bringing to trial* an individual accused of a serious crime is important.") (emphasis added). Moreover, imprisonment is only one component of a sentence. If convicted, petitioner faces a term of supervised release during which the government would be able to monitor him to ensure that he takes his medications and maintains a stable, non-violent lifestyle. The government has an interest in the continued safety of the public in general and federal employees in particular, and a term of supervised release, in conjunction with a term of imprisonment, would further that interest. Supervised release is not available if petitioner is not brought to trial. The courts below therefore reasonably determined that the government has important interests at stake.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2008